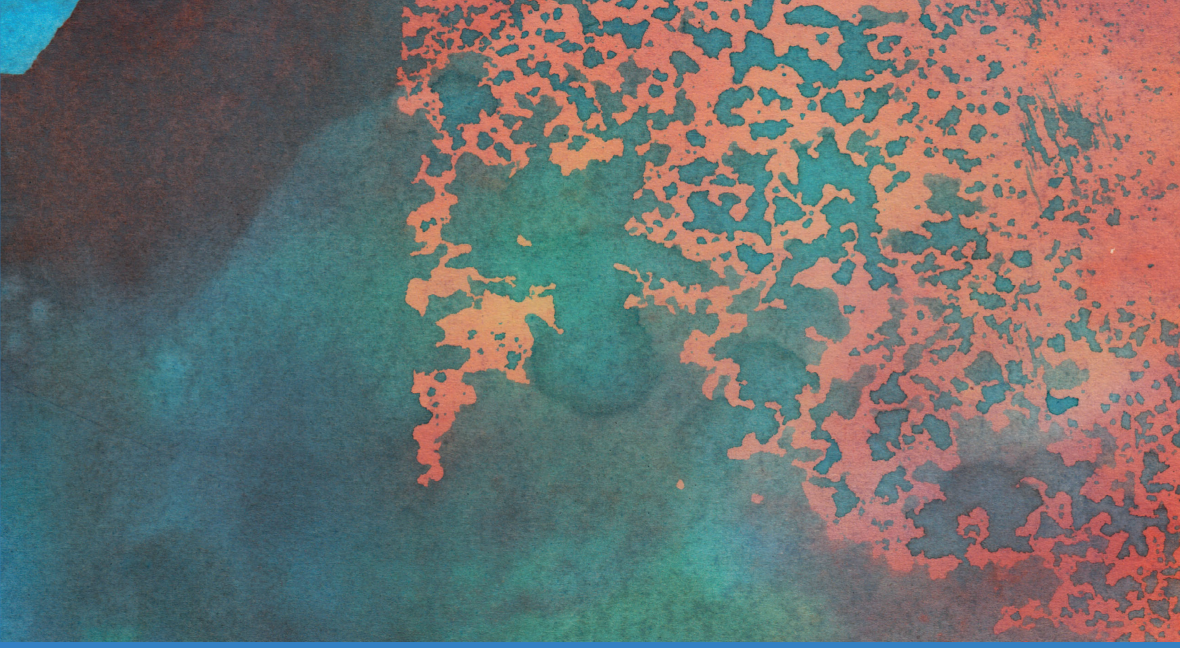
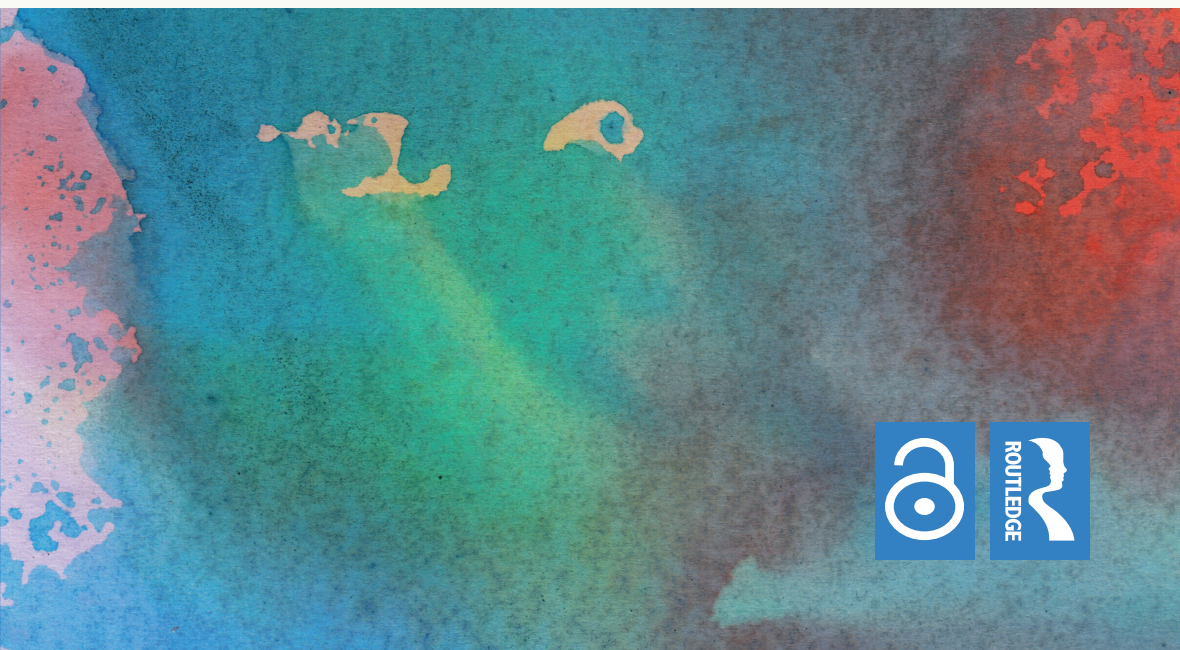


Routledge Studies in South Asian Politics

LAW AND CONFLICT RESOLUTION IN KASHMIR

Piotr Balcerowicz and Agnieszka Kuszewska



Law and Conflict Resolution in Kashmir

This book provides analysis of the legal status of territories of the former Princely State of Jammu and Kashmir, considering potential opportunities for Kashmir conflict resolution.

Containing a detailed survey of relevant legislation and international documents, chapters throughout this book investigate the attempts and failures of Kashmir conflict resolution, holding up factors which could enable more peaceful relations between India and Pakistan with inclusion of the inhabitants of the erstwhile Princely State of Jammu and Kashmir. The book goes further than outlining how India and Pakistan determine the legal status of their portions of Kashmir by demonstrating the complexity of legal arrangements and why this protracted conflict is so difficult to resolve. As the Kashmir conflict is not only about territory and irredentism, themes such as cultural and national identity, power procurement, territorial security, communal rivalry, religious radicalisation, economic factors and social issues are all taken into consideration.

Law and Conflict Resolution in Kashmir will appeal to students and scholars of peace and conflict studies, international relations, international law studies and South Asian studies.

Piotr Balcerowicz, Indologist and philosopher, is Professor at the University of Warsaw and Professor at the University of Munich (2019–2020). He specialises in Asian and Western philosophical traditions, in particular, Indian philosophies and religions, South Asian history, international relations, political philosophy and human rights. His latest book is *Early Asceticism in India* (2016).

Agnieszka Kuszewska, political scientist, is Associate Professor at the Jagiellonian University. She specialises in international relations, conflict and security studies, geostrategic specificity and contemporary history of South Asia. She is the author of three books, including *Understanding Pakistan. Radicalization, terrorism and other challenges* (2015).

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Law and Conflict Resolution in Kashmir

Piotr Balcerowicz and Agnieszka Kuszewska

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Abbreviations

AFSPA	Armed Forces Special Powers Act
AJK	Azad Jammu and Kashmir
AJKMC	All Jammu and Kashmir Muslim Conference
APNA	All Parties National Alliance
BJP	Bharatiya Janata Party (Bhāratīya Janatā Pārṭī)
CFL	Cease-Fire Line
CFV's	ceasefire violations
COAS	Chief of the Army Staff
CPEC	China-Pakistan Economic Corridor
FATA	Federally Administered Tribal Areas
GB	Gilgit-Baltistan (after 2009), before: NA; also the agencies of Gilgit and Baltistan
HR	human rights
IaJK	Indian-administered Jammu and Kashmir
J&K	Jammu and Kashmir
JeI	Jamaat-e-Islami
JeM	Jaish-e-Mohammad
JKLF	Jammu and Kashmir Liberation Front
JKPSA	Jammu and Kashmir Public Safety Act
JuD	Jamaat-ud-Dawa
KOCBMs	Kashmir-oriented confidence-building measures
LoC	Line of Control
MKA	Ministry of Kashmir Affairs (later MKANA)
MKANA	Ministry of Kashmir Affairs & Northern Areas (after 2009 MoKGB)
MoKGB	Ministry of Kashmir Affairs and Gilgit Baltistan (till 2009 MKANA)
NA	Northern Areas (between 1972 and 2009), after 2009: GB
PaJK	Pakistani-administered Jammu and Kashmir
PATA	Provincially Administered Tribal Areas
PML(N)	Pakistani Muslim League (Nawaz)
PPP	Pakistan Peoples Party
PSJ&K	(former) Princely State of Jammu and Kashmir

PSJ&K	the (former) Princely State of Jammu and Kashmir
PTI	Pakistan Tehreek-e-Insaf (Pākistān Tahrīk-e-Insāf)
RSS	Rashtriya Swayamsevak Sangh (Rāṣṭrīya Svayaṁsevak Saṅgh)
UNCIP	United Nations Commission for India and Pakistan
UNSC	United Nations Security Council
UTJ&K	union territory of Jammu and Kashmir
UTL	union territory of Ladakh

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The authors would like to extend their deepest heartfelt words of thanks to all our colleagues and friends in Kashmir, India and Pakistan who have offered us their warmest hospitality and friendship, provided us with uncountable occasions for discussion and invaluable first-hand information, but who, unfortunately, have to remain anonymous out of fear of likely reprisals, persecution and intimidation they or their beloved ones may encounter at the hands of Indian or Pakistani apparatus of state violence. Robin Cowley deserves particular thanks for going through the manuscript and proof-reading the text. Our special thanks are also due to Dorothea Schaefter and Alexandra de Brauw for welcoming the original book proposal and for their infinite patience with regular postponements of the final submission of the manuscript.

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1 Introduction

Given the complexity of India-Pakistan rivalry, the strategic interests of the opponents, geopolitical significance of the disputed regions, human rights challenges and the crucial role Kashmir plays as an inherent identity component for India and Pakistan, pertinent questions are whether any resolution of the conflict is an achievable goal and under what circumstances thinkable, and what measures may lead to its de-escalation or solution. The book rests on the premise that resolution of Kashmir conflict is a long-term, multifaceted process where the rights and freedoms of the people living on both sides of the Line of Control (LoC) have to be given foremost consideration. The conflict is not only about the territory and irredentism. It encapsulates a plethora of other components, such as cultural and national identity, nationalism, power procurement, historical inheritance, territorial security, communal rivalry, religious radicalisation, economic factors and social issues. What makes it even more complex is that it directly or indirectly engages a number of internal and external actors with diverse interests and different abilities to materialise their goals.

Parts 1 ('The Legal Status of Pakistani-Administered Jammu and Kashmir') and 2 ('The Legal Status of Indian-Administered Jammu and Kashmir') analyse the actual legal status of both the Pakistani- and Indian-administered territories of the former Princely State of Jammu and Kashmir (PSJ&K) within the respective constitutional and legal frameworks of India and Pakistan and the backdrop of historical developments. The examination is, first, based on all available legal documents, including constitutions and other laws of Pakistan and India and of the territories they administer as well as all relevant international documents, and second, on actual judicial culture and administrative practices in both regions, which comprise Pakistan-administered Azad Jammu and Kashmir (AJK) and Gilgit-Baltistan (GB), formerly known as 'Northern Areas', as well as Indian-administered Jammu and Kashmir, currently split into two union territories of Jammu and Kashmir and Ladakh in an unconstitutional move. Inadvertently, certain inconsistencies and contradictions become conspicuous in the analysis, and they seem to be maintained deliberately as political instruments in the external policies of Pakistan and India. The sheer fact of how the legal protections

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for the population of Jammu and Kashmir across both sides of the LoC and for their autonomy or self-governance are wedged in and manipulated by legal systems and extra-legal structures constitutes *per se* a violation of their human rights. An analysis of constitutional and legal documents bearing on the status of all the territories which once constituted PSJ&K reveals that on both sides of the LoC the legal situation has remained rather vague and somehow undetermined for decades. In many ways, both India and Pakistan gave shape to constitutional frameworks within their respective territories in such a manner that they intend to refer to the whole integrated territory of the former united PSJ&K, and, at the same time, various legal acts deliberately preserve the rather obscure legal status of the parts of PSJ&K they control, intentionally keeping them within a kind of legal limbo. However, a noticeable change in attitudes can be observed after 2018, which reflects a renewed perceptions of the region in Delhi and Islamabad, which leads to a more determined approach to the territories, which seems to turn the LoC into an actual border, with both India and Pakistan being satisfied with their current territorial controls and *practically* renouncing all their claims to the territories administered by the neighbour. The deliberate maintaining of the still open question of the unresolved status of Kashmir serves political goals of Delhi and Pakistan, probably more their internal than external policies, as a justification of the grip of political elites on power: the Hindutva nationalists and the 'Establishment' in Pakistan with the benefitting military and intelligence in the background.

Part 3 of the book ('The Prospects for Solving the Conflict with the Protection of Human Rights in Kashmir') not only provides an overview of theoretical debates on conflict resolution and reconciliation plans but also offers the review of selected attempts aimed at resolving the India-Pakistan dispute, including the UN resolutions and proposals phrased by human rights activists, Indian and Pakistani policymakers, political parties and various international organisations, among which General Pervez Musharraf's four-point formula, 'two plus six' formula, the Chenab formula, the self-rule and greater autonomy formulas should be mentioned. In addition, the chapters survey the variety of factors which may contribute to the improvement of India-Pakistan relations and facilitate Kashmir conflict resolution, such as introduction of the Kashmir-oriented confidence-building measures, regional cooperation and integration, including enhanced trade between the two neighbours, which would bring positive spill-over effects for the entire region. The conclusion is that, seen with a sober mind and progressive leadership, India and Pakistan should have no better option but to cooperate and integrate politically and economically if they want to avoid further escalation of the conflict and to strengthen the international position of the entire region. At the same time, any reconciliation effort would require a major shift in security paradigms of both military establishments, a U-turn in the policies that nurture majoritarian religion-based nationalisms, and a real revolution in political philosophies

of Indian and Pakistani elites which could bring the current governments down or decisively transform their mutual interactions into genuinely peace-oriented.

The question of possible future scenarios in the relations between India and Pakistan and in the management of the Kashmiri conflict opens a realm of multifaceted, albeit speculative analysis. Unfortunately, no reliable perspective of a successful initiative seems forthcoming which would also lead to improve the dismal human rights records in both countries, in particular in Kashmir. Neither Indian nor Pakistani civilian and military establishments are willing to acknowledge the existence of the problem and their own causal role, which is the first step on the road to finding a solution. What remains is the pressure on India and Pakistan to be exercised by the widely understood international community that should include other governments, governmental and non-governmental organisations, official political establishments, academic communities, human rights activists and the media. This highlights the importance of continued reporting on human rights abuses in the region and of renewing demands on both states to fully comply with their international obligations and the principles of the rule of law based on respect for human dignity, justice and good governance. Most importantly, the pressure should also come from within, namely from the citizens of both states who should be sensitised as regards the nature of the conflict and the character and inadmissibility of human rights violations committed against their fellow citizens.

The monograph is based not only on a wide range of sources that comprise both published and unpublished materials, reports, primary and secondary literature and archival material but also on the authors' first-hand experience and research carried out in the region during several visits to all the territories of the former State of Jammu and Kashmir, and numerous research visits to South Asia. The authors have greatly benefited over the years from innumerable personal contacts, discussions and correspondence with Kashmiri, Indian and Pakistani intellectuals, academics, human rights activists, researchers, and journalists both living in the region but also barred from visiting it. Face-to-face contacts with the people of Kashmir, those living in the region and in the diaspora, have largely contributed to the authors' understanding of the conflict and the final shape of the book. It is an outcome of a broader research on Kashmir and human rights in the context of the policies of India and Pakistan vis-à-vis Jammu and Kashmir, which also resulted in complementary monographs by the authors (*Kashmir in India and Pakistan policies* and *Human rights violations in Kashmir*, Routledge 2022).

The work is a result of joint labour and consists of chapters initially written separately by the co-authors, who are characterised by their distinctive analytical methodologies, insights and conclusions due to their different academic expertise and background, which is reflected in respective chapters. Following this same principle that ensures internal coherence of the whole

project, each chapter has originally been written by one author, blue-pencilled by the co-author whose input, critique, feedback and comments are included in the final form. As a result, the work is characterised, as it is hoped, by a strong interdisciplinary and balanced approach, with expertise ranging from political science and international relations to political philosophy, cultural and religious studies, history and classical Indology, that enables the authors to view the conflict from a range of different perspectives and in a more perceptive manner.

Piotr Balcerowicz and Agnieszka Kuszewska
Munich/Warsaw and Kraków/Warsaw, April 2021

Part I

The legal status of Pakistani-administered Jammu and Kashmir

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2 The right to self-determination

Piotr Balcerowicz

The inalienable right to self-determination of every nation is an integral part of contemporary international law as well as one of the basic human rights and fundamental freedoms. It has been enshrined in the Charter of the United Nations (UN Charter, Art. 1.2) as a principle, alongside the principle of equal rights, on which the UN are founded and which is essential to the development of friendly relations or peaceful coexistence between countries. The quintessential and foundational character of the right to self-determination with respect to HR in general has also been highlighted by the fact that two crucial HR documents, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly in 1966, open with an invocation of its value, and its universal importance has been acknowledged in similar wording in the African Charter on Human and Peoples' Rights (ACHPR, Art. 20(2)). There is no doubt that '[t]he right of self-determination applies to all peoples in colonial situations', albeit '[t]here is less consensus as to whether this right can be applied to non-colonial situations'.[1] However, more recent and comprehensive legal analyses and noticeable changes in the world map, including 'the substantial increase in membership of the United Nations in the 1991–1992 period [are] a reflection of this broader application—or at least acceptance—of the right of self-determination to non-colonial situations'.[2]

A logical corollary of the right to self-determination is also everyone's 'right to take part in the government of his country, directly or through freely chosen representatives' and 'right to equal access to public service in his country' as well as the conviction that 'the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures', as formulated in Article 21 of the Universal Declaration of Human Rights (UDHR).

Undeniably, the right to self-determination as one of the basic human rights, alongside its afore-mentioned corollaries, is directly applicable to the question of Princely State of Jammu and Kashmir (PSJ&K) and

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its territories currently divided between India, Pakistan and China, as reflected in resolutions of the United Nations Security Council (UNSC) and the United Nations Commission for India and Pakistan (UNCIP) concerning the State, which all (especially those formulated between 1948 and 1965) emphasise 'that the future status of the State of Jammu and Kashmir shall be determined in accordance with the will of the people'. Regrettably, all the parties involved, but especially Pakistan and India, have persistently denied this fundamental right to the people of the former State of Jammu and Kashmir, which is clearly reflected in the ambiguous legal status of the territories as well as in the manner the territories have been administered in brazen violation of this and other human rights.

What is here understood under Pakistani-administered Jammu and Kashmir (PaJK) is the total territory that remains within the authority of Pakistan after the 1947 Partition of the PSJ&K of approx. 218,779 sq km (84,471 sq miles).[3] It now comprises two units. The first is Azad Jammu and Kashmir (AJK) with an area of 13,297 sq km (5134 sq miles) and a population of 2,973,000 in 1998,[4] and 4,045,366 (in 2017).[5] The other part, territorially adjacent to Indian-administered Ladakh, is the Northern Areas (NA) (now: Gilgit-Baltistan; GB) with an area of 72,496 sq km (27,991 sq miles) and a population of 883,799 in 1998,[6] and 922,745 in 2017.[7] The total area under Pakistan's control and administration is 85,793 sq km (33,125 sq miles).[8] In addition to that, an area of 5180 sq km (13,416 sq miles) of the Shaksgam Valley (now also known as the Trans-Karakoram Tract) in the Karakoram range was ceded by Pakistan to China following the boundary agreement of 1963. The year before, as a result of the Indo-China war, China captured an area of 37,555 sq km (14,500 sq miles) of Aksai Chin, a part of Ladakh, controlled by India.[9]

After the former PSJ&K, artificially[10] created in 1846, was violently divided 101 years later as a result of the Partition of the British Raj into two separate territories administered by Pakistan and India, each of the two territories received its distinct legal status within separate constitutional orders of the new dominions. Each was nominally given the status of a self-governing entity or 'semi-autonomous semi-province', albeit to various extents and measures. The shaping of the territories and embedding them in two different legal regimes has been a continuous seven-decade long process, which is still far from over and can often also be considered problematic in jurisprudential terms. The original territory of PSJ&K now comprises six regions: on the one hand, there is Jammu, Kashmir Valley and Ladakh, all three constituting Indian-administered Jammu and Kashmir (IaJK), whilst on the other, AJK and GB (before the NA) are both administered by Pakistan as PaK, along with Chitral, once formally incorporated into PSJ&K, but currently a part of the Malakand Division administered by Pakistan.[11] Each of these territories enjoys a different legal status.

Quite divergent legal mechanisms have been applied in each case and so diverse political-legal justifications have been used to argue for their

existence. For IaJK, the Constituent Assembly of Jammu and Kashmir was instrumental, leading to the drafting of the Constitution of Jammu and Kashmir (CJ&K), into force in 1956, and in addition, certain legal measures applicable to Jammu and Kashmir (J&K) were introduced into the Constitution of India. As for Pakistani-administered AJK, it was governed on the basis of a range of documents, such as the Courts and Laws Code (1948), the Rules of Business of the Azad Kashmir Government (RBAKG; 1950, 1952, 1958, 1973, 1975, 1985) and the Azad Jammu and Kashmir Government Acts (AJKGA 1964, 1968, 1970), until 1974 when the Azad Jammu and Kashmir Interim Constitution Act (AJKIC 1974) was adopted. The territories of GB, separated from the very beginning from AJK, enjoyed a quite different, and rather unclear, legal semi-autonomous status of separate territories until the establishment of a single administrative unit in 1972 as NA, later renamed again under the Gilgit-Baltistan (Empowerment and Self-Governance) Order of 2009 (GBESGO 2009).

In many ways, both India and Pakistan, until recently, have given shape to constitutional frameworks within the respective territories in such a manner that they in many ways intended to refer to the *whole* integrated undivided territory of the former united PSJ&K, and at the same time, various legal acts deliberately preserved the rather obscure legal status of the parts of PSJ&K they control. In the case of Pakistan, its indisposition to regulate it, and therefore the will to intentionally maintain Kashmir in a kind of legal limbo, has occasionally lead to contradictory statements of, e.g., some jurists or politicians in Pakistan asserting that AJK and GB (NA) are not constitutional parts of Pakistan. For instance, in May 1973, Fazal Ilahi Chaudhry, the speaker of the National Assembly, justified the exclusion of parliamentary inquiries on the internal affairs of AJK with the argument that the territories do not form a part of Pakistan.[12] Similar opinions are occasionally voiced in the Pakistani press, for instance, 'Constitutionally, Azad Kashmir is not a part of Pakistan. But neither is it an independent state'.[13] They are countered by opinions that these territories enjoy the status of *de facto* provinces of Pakistan.[14]

The ramifications of the legal and constitutional status of the administrative divisions within the control of Pakistan and India—namely Pakistani-administered GB and AJK and Indian-administered J&K (after 2019 split into the union territory of Jammu and Kashmir and union territory of Ladakh)—involve three aspects: (1) the established laws and the manner in which they have been written down and codified in the respective states, (2) the actual practice of how the regulations are applied in reality and (3) the legitimacy both of the legal documents and of the prerogatives of respective authorities to make such laws. The discussion of these issues will thus address the legal status of PSJ&K territories within Pakistan with its regional divisions and the legal status of PSJ&K territories within India with its divisions.[15]

The analysis of the legal status of the PSJ&K territories held by Pakistan will begin with the question of how Pakistan views AJK and the other territories which originally formed a part of PSJ&K.

The Indian Independence Act 1947, introduced in the British Parliament on 4 July 1947, received the royal assent two weeks later and envisaged the creation of two independent dominions, Pakistan and India, on 15 August 1947. Section 2(2) of the Act defined two major chunks of Pakistan as consisting of the Provinces of East Bengal, West Punjab, Sind and Baluchistan. In addition, Section 2(2)(c) also mentioned the inclusion into Pakistan of the North-West Frontier Province (NWFP) on the basis of the valid votes cast in its favour. The two dominions would be governed according to the provisions of the Government of India Act of 1935, applied separately to each of them (Section 8). Section 7 stated that from the appointed day, i.e. from 15 August 1947, British suzerainty over and responsibilities vis-à-vis the Indian (i.e. Princely) States and tribal areas would lapse, whereby the dependence of princely states would cease on that day and all powers be returned to them. PSJ&K was not mentioned in the Act, like all other princely states, except for a general clause in Section 2(4) that 'nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions'. This was the only clause regulating the issue of the accession of princely states to the new dominions, i.e., either India or Pakistan. In the light of the Indian Independence Act, their accession to either dominion seemed voluntary, though the states were strongly encouraged by the then-Viceroy Louis Mountbatten to accede to either of the dominions. Legally, there existed no instrument of coercion. Out of almost 600 princely states,[16] all are said to have taken the decision before 15 August 1947, except at least three, one of them being the State of Jammu and Kashmir.[17]

Notes

1. McCorquodale (1994: 859–860).
2. McCorquodale (1994: 861). Reflections of the new understanding are, for instance, Security Council (UNSC) resolutions in 1992 concerning (1) former Soviet Republics: Estonia (No. 709), Latvia (710), Lithuania (711), Kazakhstan (732), Armenia (735), Kyrgyzstan (736), Uzbekistan (737), Tajikistan (738), Moldova (739), Turkmenistan (741), Azerbaijan (742), Georgia (763); and (2) former republics of Yugoslavia: Croatia (753 in 1992), Slovenia (754), Bosnia and Herzegovina (755 in 1992), Montenegro (1691 in 2006); as well as (3) Eritrea (828 in 1993), East Timor (1414 in 2002), South Sudan (1999 in 2011) and their unquestionable admission to United Nations, as well as the UN General Assembly's motion changing the status of the State of Palestine to 'UN non-member observer state' in 2012.
3. After the 1941 *Census of India* (1941: 1). This is the figure which is also mentioned in ARJK (1944: 1). However, as Alastair Lamb (1994: 14–15, n. 3) observes, 'There exists some dispute as to the precise area of the State of Jammu and Kashmir. An official Pakistani source in 1954 indicated 84,471 square miles. The 1891 Census (of British India) put the area as 80,900 square miles, but the 1911 Census increased the figure to 84,492 square miles.

This shrank slightly to 84,258 square miles in the 1921 Census. In 1961 the Government of India suggested that earlier estimates of the area of Jammu and Kashmir were incorrect: the true figure should be 86,023 square miles (no doubt because of the official inclusion in India of the Aksai Chin). The point, of course, was that Jammu and Kashmir possessed vague (to put it mildly) frontiers with both Tibet and China which could be interpreted to give the State a variety of areas'.

4. 1998 *Census of Pakistan*, after AJK Government (2013: 15).
5. FBoS (2017a, 2017b), and AJK Government (2018: 10).
6. Bansal (2013: 13).
7. FBoS (2017a, 2017b).
8. Or 78,114 sq km according to Mir (2013: 32–33).
9. Fraser (1965: 192–193), Mir (2013: 32–33).
10. Under the Treaty of Amritsar (ToA), the Raja of Jammu, Gulab Singh of the Rajput Dogra Dynasty, purchased the hotchpotch of culturally, linguistically and historically unrelated territories, which he had earlier conquered as a general governor under the rule of the Sikh Maharaja Ranjit Singh and his successors, from the British who were interested in creating a buffer state. According to the Treaty, 'The British Government transfers … all the hilly or mountainous country with its dependencies situated to the eastward of the River Indus and the westward of the River Ravee (i.e. Ravi—P.B.) including Chamba and excluding Lahol (Lahaul—P.B.) …' (ToA 1846, Article 1). These were the territories ceded a week earlier by the former Sikh Empire to the East India Company under the Treaty of Lahore of 9 March 1946, which ended the First Anglo-Sikh War. Prior to 1846, the term 'Kashmir' (Kaśmīra) primarily referred to the Kashmir Valley.
11. Dani (1991: 7–8).
12. *Dawn* (31.5.1973, p. 1), Conrad (1974: 284, n. 176).
13. Faruqui (2015).
14. Asghar (2015): 'Finance Minister Ishaq Dar emphatically said in the National Assembly on Tuesday that Gilgit-Baltistan (GB) and Azad Jammu and Kashmir (AJK) were part of Pakistan and not disputed territories. The statement came when the minister referred to India's objections to the planned China-Pakistan Economic Corridor on the ground that its route passed though "a disputed territory in Pakistan-controlled part of Jammu and Kashmir state"'.
15. For a historical survey of legal instruments applicable to AJK, see Rose (1992).
16. Numbers vary, usually between 562 and 584, see, e.g., Snedden (2015: 135), Khan (1994).
17. See also, e.g., Farrell (2003: 294–298). Despite the general claim, there were other exceptions which acceded to the Union of India much later, for instance Garhwal Kingdom acceded in August 1949.

3 Pakistan vis-à-vis Azad Jammu and Kashmir

Piotr Balcerowicz

Prior to the Partition, two identical telegrams were sent from Srinagar to the dominions of India and Pakistan on 12 August 1947 by retired Major General Janak Singh, who had assumed the office of the new Prime Minister of Kashmir two days earlier after Ram Chandra Kak had been removed from the office. They contained a proposal for a Standstill Agreement (SA) with India and Pakistan 'on all matters on which these exist at present moment with outgoing British India Government', with the suggestion 'that existing arrangements should continue pending settlement of details'.[1] The agreement was accepted by the Pakistani side on 15 August, whereas the Government of India replied that either the Prime Minister of Kashmir or a duly authorised minister should visit Delhi to negotiate the details of the agreement. The note in the reply that 'early action [is] desirable to maintain intact existing agreements and administrative arrangements' implied a certain pressure or even warning. Since no Kashmiri representative flew to Delhi, the SA was never concluded. The Agreement with Pakistan regulated all matters between Pakistan and Princely State of Jammu and Kashmir (PSJ&K) just as they had operated prior to the Partition between the State and the British Raj until their anticipated supersession by new regulations.

The division of PSJ&K which resulted from the tribal invasion of Pakistani 'Pukhtoons' (Pashtuns) and other events that followed shaped relations between Pakistan and Azad Jammu and Kashmir (AJK) in a completely different manner. Those parts of PSJ&K which came to be occupied and administered by Pakistan became Pakistan's sub-dominion and new laws were gradually devised to govern the territories. The first legal document of importance which referred, albeit indirectly and in a vague manner, to the issue of the territories, now bisected into AJK and the remaining territories lumped together as Gilgit and Baltistan agencies (Northern Areas (NA, GB),[2] from the perspective of the Federation of Pakistan, was the Objectives Resolution introduced by the first Prime Minister of Pakistan Liaquat Ali Khan, adopted by the Constituent Assembly on 12 March 1949. The Resolution set a goal for the Constituent Assembly to work out the first 'constitution for the sovereign independent State of Pakistan', strongly tilted

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towards Sunnī Islam as the ideological basis of the state, which contravened Muhammad Ali Jinnah's promises of Pakistan as a secular state. Pakistan is explicitly defined in the document as a state 'wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran and the Sunna', which contravenes the true principles of democratic open space for all worldviews and their equal treatment. The same document declares that Pakistan is a state 'wherein the principles of democracy, freedom, equality, tolerance and social justice, *as enunciated by Islam*, shall be fully observed'. Thus, the dominant ideology of the state is religious, and the principles of democracy, freedom, equality, tolerance and social justice are compromised, viz. defined through the prism of Islam. The document was later incorporated in its entirety in the preambles of the 1956 and 1973 constitutions of Pakistan. The Resolution was the first Pakistani document which referred to 'the territories now included in or in accession with Pakistan and [to] such other territories as may hereafter be included in or accede to Pakistan that shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed'. The territories now included in Pakistan comprised neither NA nor AJK, which were instead indicated in the clause of 'such other territories as may hereafter be included in or accede to Pakistan', which also opened a space for Indian-administered territories of PSJ&K to be merged with the federation of Pakistan. This approach set the benchmark for all subsequent constitutional acts in Pakistan. Accordingly, none of the three constitutions of Pakistan refers to any of these territories explicitly, albeit they do it indirectly and comprise both AJK and NA (GB) and Indian-administered territories.

The first of these, the Constitution of the Islamic Republic of Pakistan (as the country was renamed) adopted in 1956, incorporates the respective formulations of the Objectives Resolution in the Preamble and sees 'the sovereign independent State of Pakistan' as such 'wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan should form a Federation, wherein the Provinces would be autonomous with such limitations on their powers and authority as might be prescribed'. Neither AJK nor NA were either included in or in accession with Pakistan, hence were comprised under 'such other territories as may hereafter be included in or accede to Pakistan'. The purport of the passages was to demonstrate continuity within the political process of creating the state of Pakistan and consistency between the constitution and the earlier Objectives Resolution. Nonetheless, these passages are somewhat redundant inasmuch as their spirit is elaborated further, in Article 1, which decrees, '(2) The territories shall comprise: (a) the territories of the Provinces of East Pakistan and West Pakistan;[3] (b) the territories of States which are in accession with or may accede to Pakistan; (c) the territories which are under the administration of the Federation but

are not included in either Provinces; and (d) such other territories as may be included in Pakistan'. These provisions should be read together with Article 203 of the same 1956 Constitution[4], which stipulates, 'When the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and the said State shall be determined in accordance with the wishes of the people of that State'. Accordingly, since neither AJK nor NA could be in a process of accession before a plebiscite (Art. 1(b)), Article 1(c) should be understood to refer both to AJK and NA, whereas Article 1(d) opened a way for the inclusion of the remaining territories of PSJ&K currently under the administration of India. Accordingly, the 1956 Constitution of Pakistan did not formally consider AJK or NA (GB) a genuine integral part of Pakistan's territories but referred to them and to Indian-administered Jammu and Kashmir (J&K) indirectly in Article 1 (2)(c)&(d).

In consonance with the territorial divisions stipulated in Article 1, Article 106 regulated the 'Constitution of Provincial Assemblies', and specified seat numbers and other details for Baluchistan, the North-West Frontier Province, Punjab and Sindh.[5] Neither in this nor in the following Articles 107–140, concerned with the Provinces' finances, governments, legislation etc., do we find any reference to AJK, which is effectively treated as a 'no-territory' of Pakistan.

The Laws (Continuance in Force) Order of 1958 brought the abrogation of the previous constitution and provided a new legal framework in the absence of any other constitution as a result of martial law, imposed on 7 January 1958 by President Iskander Mirza, who appointed General Mohammed Ayub Khan as the Chief Martial Law Administrator. Its Article 1(3) declared that the Order 'extends to the whole of Pakistan' and for all practical purposes treated AJK as well as NA as territories of Pakistan under martial law. Martial law was also applied to those regions where all political activities were banned, and as a result the All Jammu and Kashmir Muslim Conference (AJKMC), as the main political force in Azad Kashmir, lost its supreme position'. Article 4(1) contained a vague and ambiguous reference to 'legal instruments in force in Pakistan or in any part thereof or having extra-territorial validity' which could imply that the martial law regulations could also be applicable to certain other territories under Pakistan's administration.

The Constitution of Pakistan of 1962 was 'dictatorial' in the sense that 'Field Marshal Mohammad Ayub Khan' (not any assembly, parliament or other collective or elected body) did 'hereby enact this Constitution'. It partly repeated the definitions of the Pakistani territories contained in the previous constitution, but with some noteworthy omissions and simplifications. Article 1(2) specified that 'the Republic shall consist of (a) the Province of East Pakistan and the Province of West Pakistan; and (b) such other States and territories as are or may become included in Pakistan, whether by accession or otherwise'. Non-Pakistani territories of states which are in accession with or may accede to Pakistan, territories which are under the

administration but are not included in either provinces of Pakistan and any other territory which may be included in Pakistan were merged into one category which incorporated all potential territories which were or might become included in Pakistan at some point in the future. The mode of inclusion was extended: the territories were said to be potentially included not only through the process of accession, which implied the free will of such a state, but also other means ('otherwise'), potentially comprising violent measures as well, which should not be surprising, given the belligerent spirit behind the 1962 constitution and its enactor.

The current Constitution of the Islamic Republic of Pakistan, adopted in April 1973 after the most dramatic and traumatising events to have engulfed Pakistan to date and which resulted in the 'second partition' in 1971, not only reverted to some of the details of the 1956 and 1962 constitutions but also introduced important changes in the severely truncated state. In its Preamble, it preserved the full text of the 1949 Objectives Resolution, including the entire clause referring to 'the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan' as autonomous units constituting a federation. In addition, in Article 1(2), the 1973 Constitution defined the territories of the Federal Republic of Pakistan as comprising '(a) the Provinces of Baluchistan (*Balochistan), the North-West Frontier (*the Khyber Pakhtunkhwa), the Punjab and Sindh (*Sind); (b) the Islamabad Capital Territory, hereinafter referred to as the Federal Capital; (c) the Federally Administered Tribal Area; and (d) such States and territories as are or may be included in Pakistan, whether by accession or otherwise (*current name as of February 2017)'. Section 1(2)(d) only obliquely refers to the areas of NA (GB) and AJK; however, it leaves their legal constitutional status vague with the modal form ('are or may be included in Pakistan').[6] Given the enumerative nature of the Article, which lists all territories of the Federation, to say that its territories comprise 'such … territories as are … included in Pakistan' is purely tautological and carries no information. The modus of the formulation with respect to NA and AJK has apparently been deliberately chosen to preserve both territories as if 'suspended' between the status of true territories of Pakistan (either as provinces or tribal areas) and the status of territories not yet properly incorporated into the republic. In addition, Section 1(1)(d) indirectly referred to Indian-administered J&K.

Article 1 should be read together with Article 257,[7] which contains explicit provisions relating to the State of J&K and seems to dispel the vagueness of the formulation of Article 1(1)(d): 'When the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of the people of that State'. The Article refers not only to the people and territories of AJK and NA (GB) currently under Pakistani administration but, by extension, also to the whole historical PSJ&K, including the areas under India's administration. This further substantiates the interpretation

that AJK is *not* constitutionally treated as an integral and permanent part of Pakistan, and its inclusion in the Federation as an administered territory is temporary until the final resolution of the status of the PSJ&K territories.

The interpretation becomes more complex; however, once we take into account Article '258. Government of territories outside Provinces', which rules that '[s]ubject to the Constitution, until Majlis-e-Shoora (Parliament) by law otherwise provides, the President may, by Order, make provisions for peace and good government of any part of Pakistan not forming part of a Province'. At face value, it seems most doubtful that the provisions should apply to AJK since the territories are not explicitly mentioned in the Constitution of Pakistan to form a constitutional part of the Federation. Furthermore, Article '247. Administration of Tribal Areas' expressly applies to the Federally Administered Tribal Areas (FATA), which are clearly part of the Federation of Pakistan through Article 1(2)(c), albeit they do *not* form a separate province of Pakistan as such. Article '257. Provision relating to the State of Jammu and Kashmir' concerns AJK, whereas Article '258. Government of territories outside Provinces', if applicable to FATA, would be redundant, since FATA is already included in Article 247, and the formulation of Article 258 is almost identical with Section 247(4): 'Notwithstanding anything contained in the Constitution, *the President may*, with respect to any matter within the legislative competence of Majlis-e-Shoora (Parliament), and the Governor of a Province, with the prior approval of the President, may, with respect to any matter within the legislative competence of the Provincial Assembly *make regulations for the peace and good government of a Provincially Administered Tribal Area or any part thereof, situated in the Province* (italics—P.B.)'. Hence, Article 258 should not legally cover FATA. Since there remains hardly any other territory, apart from FATA, which potentially forms a part of Pakistan and is, at the same time, *not* a Province (Article 1(2)(a)), except for the Islamabad Capital Territory (Article 1(2)(b)), AJK and GB, Article 258 should refer to them all. If, however, it does provide for AJK and GB, it appears to stand in contradiction with the preceding Article 257 that leaves the status of all the Kashmiri territories undetermined for the time being.

The customary interpretation and actual legal practice, however, showed that Article 258 was often understood to specifically authorise the Government of Pakistan to make laws for GB and AJK, which, however, entails certain contradictions. With his opinion that '[a]lthough Northern Areas Council Legal Framework Order 1994 or Order 2009 or Interim Constitution of AJK do not specifically refer to this article of the Constitution, but these shall be deemed to have been made under it', Syed Manzoor Hussain Gilani (2009) is one of a number of lawyers and politicians subscribing to such a view. This opinion is even more prevalent when it comes to the relations between Islamabad and GB. In January 2016, the Federal Minister for Kashmir Affairs and GB, Chaudhary Muhammad Barjees Tahir, maintained that the responsibility to ensure good governance

in Pakistani-administered Kashmir was placed on the central government under Article 258 of the Constitution of Pakistan in addition to the United Nations Commission for India and Pakistan (UNCIP) resolutions.[8] A similar view, though focused on GB, was expressed in a report prepared by the GB Policy Institute much earlier: 'The Gilgit-Baltistan (Empowerment and Self-Governance) Order 2009 is a turning point in the administrative history of the region. Anchored in Article 258 of the Constitution of Pakistan, the Order, though short of providing constitutional status to GB, has given the region identity by renaming it as Gilgit-Baltistan and introducing an improved setup of legislative system, i.e. Legislative Assembly and GB Council'.[9] In the same year, the Supreme Appellate Court of GB stated that the Gilgit-Baltistan (Empowerment and Self-Governance) Order, 2009, was enacted in pursuance of Article 258 of the Constitution of Pakistan.[10] A 2015 judgement of the Peshawar High Court[11] is also supportive of such interpretation. While considering 15 writ petitions, filed by Isaac Ali Qazi, Advocate, against the Government of Pakistan concerning the liability to Income Tax/ Sales Tax of the petitioners' import to FATA or Provincially Administered Tribal Areas (PATA), the High Court observed, 'there is a stark difference in the constitutional command relating to applicability of law to FATA/ PATA (Article 247) and AJK (Article 258). The intention of the legislature is evident from the bare reading of the said provisions of the Constitution. Thus, any law or principle laid down for Azad Jammu Kashmir, would not be applicable to FATA or PATA' (p. 21). The same stance is also adopted by the Human Rights Commission of Pakistan.[12]

A separate issue is the actual legal status of an individual, a legal person who is a resident of AJK, which has a direct bearing on his/her constitutional rights in Pakistan in the light of the Constitution. Article 63(1)(f) of the Constitution, which deals with disqualifications for membership of Majlis-e-Shoora, i.e. the Parliament of Pakistan, stipulates that 'A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if— … (f) being a citizen of Pakistan by virtue of Section 14B of the Pakistan Citizenship Act, 1951 (II of 1951), he is for the time being disqualified under any law in force in Azad Jammu and Kashmir from being elected as a member of the Legislative Assembly of Azad Jammu and Kashmir'. A disqualification of a person from being elected to the Parliament of Pakistan under any law binding in AJK results in the disqualification on the federal level. The Constitution indirectly accepts that an Azad Kashmiri is a citizen of Pakistan who can actively participate in federal elections, i.e. can be elected to the Parliament of Pakistan, which is a logical requirement of him/her being disqualified from being elected, but who is also entitled to vote, being a citizen of Pakistan (Article 51 of the 1973 Constitution). However, the same does not apply to the residents of GB (NA), who nowhere find a separate mention in the Constitution. Being a citizen of Pakistan should make one entitled to have direct political representation in the representative framework of the Parliament, or the

National Assembly and the Senate; however, no seats are allocated to the representatives from AJK or GB (NA) in the 1973 Constitution (Articles 51, 59). The residents of AJK are treated by the Constitution as citizens of Pakistan in one way, including the right to contest federal elections, but not all citizens/constitutional rights are granted to them in many other respects. At the same time, the residents of these territories are subject to all taxes, including income tax, which Pakistani citizens are required to pay.

It is true that AJK has its parliament, such that it may appear not to substantially differ from constitutional provinces of Pakistan. In contrast, all the provinces have their respective provincial *assemblies*, not provincial parliaments. Whereas the residents of all the provinces have the right to vote in general elections to the National Assembly at the federal, i.e. super-provincial level, Azad Kashmiris do not enjoy the right to send their representatives to either house of the bicameral Parliament of Pakistan, the National Assembly and the Senate.

The international Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930 provides that it is within the prerogatives of every state to regulate the question of its citizenship and determine who should legitimately be classified as its citizen.[13] The Constitution of Pakistan nowhere defines what 'citizen of Pakistan' means. Instead, it evokes the Pakistan Citizenship Act of 1951 (PCA 1951).[14] Its two relevant clauses are Articles 8(2) and 14B, the latter explicitly evoked in Article 63(1)(f) of the 1973 Constitution. Article 8(2) provides that 'a subject of the State of Jammu and Kashmir who, being under the protection of a Pakistan passport, is resident in the United Kingdom or such other country as the Federal Government may, by notification in the official Gazette, specify in this behalf, shall, without prejudice to his rights and status as a subject of that State, be deemed to be, and to have been, a citizen of Pakistan'. 'A subject of the State of Jammu and Kashmir' is a category adopted from earlier laws, in particular from the State Subject Rule (State Subject Definition Notification [SSDN]) of 1927, and roughly refers to the legitimate citizens of PSJ&K and their descendants, which we may here call genuine 'citizens of the State of Jammu and Kashmir', including 'citizens of AJK' and 'citizens of the NA (GB)', both under Pakistani administration as well as 'citizens of J&K' under Indian administration. Section 8(2) specifies that a citizen of AJK can be issued a Pakistani passport and be treated as a citizen of Pakistan for all practical purposes while 'being under the protection of a Pakistan passport' outside Pakistan yet *only* in countries which the Federal Government may officially specify. The status provided to citizens of AJK and GB is not tantamount to the status of full citizenship within Pakistan. The vagueness of formulations does not, however, allow for the similar treatment of citizens of J&K under Indian administration, who also enjoy the status of state subjects imparted on them as descendants by the State Subject Rule in 1927, for they, living within the territories of India or administered by India, cannot be issued a Pakistani passport, unless the person migrates to Pakistan

(the Citizenship Act, Article 14B). Article 8(2) was added to the Pakistan Citizenship (Amendment) Act XLVIII of 1973 (PCA 1973-1). The other relevant section, Article 14B, 'Certain persons to be citizens of Pakistan' of the same Act, also provides that a descendent resident of other territories of the former State of J&K (i.e. of those territories not administered by Pakistan) may acquire the status of a citizen of Pakistan.[15]

As Article 8(2), this article was inserted by the Pakistan Citizenship (Second Amendment) Act XXXIX of 1973 (PCA 1973-2). It means that before the two 1973 amendments, the question of the citizenship status of the subjects of the State of J&K resident in the territories under Pakistan's administration was not regulated. Since the point of departure for both Articles is the status of the historical subject of PSJ&K, the residents of AJK and of NA (GB) can be issued Pakistani passports as travel documents and be treated as citizens of Pakistan. However, these provisions do not necessarily carry other implications which Pakistani citizenship would have entitled one to.

The official position of the Pakistani authorities on the issue is encapsulated in the information provided by a representative of the High Commission for the Islamic Republic of Pakistan in Ottawa to the Immigration and Refugee Board of Canada (IRB) on 17 August 1994: 'Pakistan considers Kashmiris living in Indian and Pakistani controlled areas to be neither Pakistani nor Indian. Pakistan and the international community recognise Kashmiris living in these areas to be citizens of the former state of Jammu and Kashmir. However, Pakistan maintains that Kashmiris can opt for Indian or Pakistani citizenship if they wish to do so. Pakistan has no special citizenship programme for Kashmiris wanting to acquire Pakistani citizenship. Being born in Kashmir does not automatically entitle Kashmiris to Pakistani citizenship. Kashmiri applicants for Pakistani citizenship are treated like other applicants'.[16]

Clearly, Pakistan's legal treatment of the territories of PSJ&K now under its administration, i.e. AJK and GB, should logically be distinguished from its treatment of the population residing in the territories. This notwithstanding, the two issues cannot be separated. The way Pakistani legislation regulates the citizenship status of the population resident in Pakistani-administered Jammu and Kashmir (PaJK) has a bearing on Pakistan's stance vis-à-vis the legal status of the territories under its jurisdiction.

Interestingly, Article 14B of the Pakistan Citizenship Act, inserted in 1973 into Article 14 with PCA (1973-2), stipulates that 'dual citizenship or nationality is not permitted' except for certain specified cases.[17] Not meant to function as an independent article, since it was intended to regulate the question of dual citizenship, the implication it carries is that Pakistan does not recognise any separate citizenship for citizens of AJK/GB or descendent residents of other territories of PSJ&K who have migrated to Pakistan other than Pakistani citizenship. Accordingly, if citizenship is related to

statehood, then no room for a statehood of PSJ&K as such is even potentially recognised.

While drafting laws for the territories of PaJK, Pakistan goes back to the idea of the state subject, i.e. the legitimate citizen of the former State. This was spelled out in the SSDN of 20 April 1927 sanctioned by Maharaja Hari Singh. The document distinguished four classes of state subjects in the hierarchical order of importance and priority: Class I comprises all persons born and residing within the State before 1846 (i.e. before the reign of Maharaja Gulab Singh), and also persons who settled in Kashmir 'before the commencement of samvat year 1942', i.e. before 12 March 1885, and have since been permanently residing therein, i.e. 'indigenous, or native' Kashmiris; Class II refers to 'all persons other than those belonging to Class I who settled within the State before the close of samvat year 1968', i.e. March 1912, 'and have since permanently resided and acquired immovable property therein', viz. to outsiders who settled in Kashmir prior to 1912; Class III are 'all persons, other than those belonging to Classes I and II permanently residing within the State, who have acquired under a rayatnama (*rāyāt-nāma*; 'royal decree of relaxation'—P.B.) any immovable property therein or who may hereafter acquire such property under an ijazat nama (*ijāzat-nāma*; 'royal decree of permission'—P.B.) and may execute a rayatnama after ten years continuous residence therein'; i.e. individuals from outside of Kashmir who obtained a royal (state) residence permit, which was related to their investment in Kashmir and the economic interests of the state; Class IV comprises '[c]ompanies which have been registered as such within the State and which, being companies in which the Government are financially interested or as to the economic benefit to the State or to the financial stability of which the Government are satisfied, have by a special order of His Highness been declared to be State subjects', i.e. similar to Class III in the sense of the economic interests of the state, but unlike Class III, it refers to companies. Furthermore, the descendants of those respective classes inherited the same state subject status within the same class. The reference to the state subject in the laws of Pakistan with reference to AJK/GB implies that there should be no permanent residency in the territories granted to any individual who arrived in Kashmir after the Partition. It is also implied that any permanent residency of outsiders within the territories of Kashmir is not legal (cf. Balcerowicz–Agnieszka, 2022b: 164–166).

A legal corollary of Kashmiri state subjecthood is the issue of appropriating and possessing land in PaJK by outsiders, i.e. non-state subjects. A prohibition on transfer of land ('permanent alienation of land')[18] in favour of non-state subjects was contained in Section 4 of the Jammu and Kashmir Alienation of Land Act (JKALA) decreed by the Maharaja in 1938. It was subsequently incorporated into the AJK legal code in 1949 through the Azad Jammu and Kashmir Adaptation of Laws Resolution (AJKALR) and Notification 3323. The same laws were consolidated with the legislation of Indian-administered Jammu and Kashmir (IaJK) through the Constitution

(Application to Jammu and Kashmir) Order (CAJKO 1954) in 1954. Accordingly, in both parts of Kashmir, the law provides that no Pakistani or Indian person has the right to buy land in any part of Kashmir.[19] That law ought also to be strictly enforced in GB as a part of the former PSJ&K; however, there has never been a corresponding explicit law concerning the adaptation of the Alienation of Land Act for that region.[20] Certain protections as regards permanent residency and possession of the land which the state subjects enjoy might point to the special status of the territories but do not necessarily imply their separate statehood, but merely an autonomous status.

The Provisional Constitution Order (1 of 1999), proclaimed on 14 October 1999, two days after the overthrow of Prime Minister Nawaz Sharif's government by General Pervez Musharraf, asserted that '[i]t extends to the whole of Pakistan' (Art. 1(1)). Through Art. 2(1), 'the provisions of the Constitution of the Islamic Republic of Pakistan' were temporarily suspended. Again, emergency rule was declared across Pakistan by General Musharraf on 3 November 2007 through the Provisional Constitution Order (No. 1 of 2007), which asseverated that '[i]t extends to the whole of Pakistan' (Art. 1(1), also Art. 2(1)). The state of emergency was extended to both GB and AJK: 'In 2007, the political crisis in Pakistan reverberated in Kashmir. Chaudhry Majeed, the PPP president for Azad Kashmir, and other party activists were briefly detained in November following Musharraf's declaration of a state of emergency, with some placed under house arrest for 30 days' (FH JK 2008). Clearly, the territories of PaJK were treated as parts of Pakistan.

As we can see, from the perspective of the political centre in Karachi, Rawalpindi and Islamabad, the territories of the former State of J&K, currently under Pakistani administration, are in many ways not treated as genuine, integral parts of the Pakistani Federation or their status remains ambiguous. Similarly, Pakistan's policies towards the residents are incongruous. In external relations, in matters involving other states, they are 'deemed to be citizens of Pakistan', whereas when it comes to internal matters, the status of Azad Kashmiris, and in general of all the residents of PaJK, is not on a par with the residents of Pakistan's provinces.

On many occasions, apart from other instruments of control, Pakistan constitutionally treats the territory of AJK as its own territory by establishing laws there and administering it as if it were a mere territorial extension of Pakistan, as in the case of the 1958 martial law automatically extended to AJK and NA (*vide supra*). Furthermore, in Part II of First Schedule, the 1973 Constitution, under III *Ordinances Promulgated by the President*, we find the following regulation '2. The Jammu and Kashmir (Administration of Property) Ordinance, 1961 (III of 1961)', preserved by the Constitution Fourth Amendment Act, 1975.

The policies are not consistent though. In contrast, soon after the military coup, the Basic Democracies Order, 1959, introduced Ayub Khan's concept of a party-free grassroots level democratic system with a five-tier arrangement of elected councils in Pakistan. It was only a year later that

this system of indirect elections by the votes of 'basic democrats'[21] was extended by the President to AJK through the Basic Democracies Act.[22] An Electoral College comprising basic democrats of AJK and Kashmiri refugees in Pakistan elected the president and a 12-member council. Less than two decades later, on 5 July 1977, General Muhammad Zia ul-Haq, Chief of the Army Staff, proclaimed martial law throughout Pakistan, suspended the Constitution of the Islamic Republic of Pakistan, dissolved the National Assembly, the Senate and the Provincial Assemblies of Pakistan, dismissed the federal and provincial governments and himself assumed the office of Chief Martial Law Administrator.[23] The emergency did not *automatically* hold in AJK, whereby it was intimated that these were not treated as an integral part of Pakistan. Zia ul-Haq subsequently extended the new laws to AJK issuing a martial law order on 31 July 1977, suspending all political activities there and, finally, dissolved the AJK Legislative Assembly on 10 August 1977, overriding all local laws.

Since 1952, actual power over the Pakistani-administered territories has continually rested with the centre in Islamabad, through the Ministry of Kashmir Affairs and Northern Areas (MKANA). The Ministry is one among thirty or so ministries of the Government of Pakistan and is an integral part of the governmental and administrative structure of Pakistan. Its ministers, secretaries and officers are generally recruited from within Pakistan and not from among the residents of PaJK, who have no administrative representation. Through the now Ministry of Kashmir Affairs and Gilgit Baltistan (MoKGB), Pakistan's government effectively exercises complete control over the territories which are for all practical purposes and interests of Islamabad treated as an integral part of Pakistan's territory, despite all the vagueness of the constitutional, legal regulations but held suspended in a legal limbo when it comes to the citizen rights of the residents.

Notes

1. See also, e.g. Farrell (2003: 294–298). Despite the general claim, there were other exceptions of princely states or kingdoms which acceded to the Union of India much later, for instance Garhwal Kingdom acceded in August 1949.
2. Dani (1991: 5–6).
3. '*Explanation*: In the Constitution, the Province of East Pakistan shall mean the Province known immediately before the Constitution Day as the Province of East Bengal, and the Province of West Pakistan shall mean the Province of West Pakistan set up by the Establishment of the West Pakistan Act, 1955'.
4. Reaffirmed in Article 221 of the 1962 Constitution and Article 257 of the 1973 Constitution.
5. Balochistan and Khyber Pakhtunkhwa were substituted with (Eighteenth Amendment) Act 10 of 2010.
6. Cf. also Gilani (2009).
7. Which recapitulates the wording of Article 203 of the 1956 Constitution and Article 221 of the 1962 Constitution.
8. Tariq Naqash (2016-02-27).

9. GBESGO Report (2010: 1).
10. GBB (2011).
11. See Judgement Sheet, Peshawar High Court, Peshawar, Judicial Department, Writ Petition No. 916-P/2013 with I.R., date of hearing 7 April 2015 and date of announcement 30 April 2015.
12. HRCP-PCh (2005: 58).
13. CCQRCNL, Art. 1: 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'. See also Parry (1958: 367).
14. Amended soon after its approval in 1952, and subsequently in 1972, twice in 1973 (PCA 1973-1 and PCA 1973-2), and extended in 2000 (the Pakistan Citizenship (Amendment) Ordinance).
15. 'A person who being a subject of the State of Jammu and Kashmir, has migrated to Pakistan with the intention of residing therein until such time as the relationship between Pakistan and that State is finally determined, shall, without prejudice to his status as such subject, be a citizen of Pakistan'.
16. IRBC (1994).
17. The exceptions are regulated by Article 14(3) (through PCA 1972) and allow for dual citizenship in the case of 'the citizen of the United Kingdom and Colonies or of such other country as the Federal Government may … specify in this behalf'.
18. In the document, the expression 'land' means land as the site of any building, for agricultural purposes, pasture etc., but also includes the sites of buildings and other structures on such land (JKALA, Sec. 2(2)). Section 2(3) introduces the idea of 'permanent alienation' including 'sale, gift, bequest, grant of occupancy rights and exchange other than an exchange made for purpose of consolidation of holdings'.
19. There have been numerous attempts to amend or rescind the laws along LoC, usually under the pretext that the law allows for immovable property other than land to be transferred to non-state subjects or it applies only to permanent alienation of land and does not cover the lease etc.
20. The result is that 'in the Gilgit and Skardu areas, large tracts of land have been allotted to non-locals. Other outsiders have purchased substantial stretches of land…' (Khan 2002) and 'the business in the area is in hands of the outsiders settled there' (Shekhawat 2007).
21. A system of restricted form of elections based on rural and urban councils directly elected by the people that circumvented political parties and was meant to decentralise political system; see: Choudhury (1963), Ziring (1965), Gauhar (1985).
22. Baid (1995: 87), Ali–Rehman (2001: 120), Alam–Bali (2012: 29), Puri (2012: 41).
23. See: Proclamation of Martial Law, *Gazette of Pakistan, Extraordinary*, Part I, 5 July 1977.

4 Pre-Constitution Azad Jammu and Kashmir vis-à-vis Pakistan

Piotr Balcerowicz

How is the legal status of the territories seen from the perspective of the constitutional regulations and laws of AJK? After the formation of AJK, which followed a number of events between the Partition on 15 August 1947 and Maharaja Hari Singh's accession to India on 26 October, including the Poonch uprising, interreligious violence and a tribal invasion of Pakistani 'Pukhtoons' (Pashtuns)[1] and the establishment of the local government on 24 October 1947, the territories were first administered on the basis of a few newly adopted legal documents.[2]

Historically, the first of these laws was the Azad Kashmir Courts and Laws Code Act (AJKLC) passed through Resolution No. 82 in 1948, revised in the following year as the Azad Jammu and Kashmir Courts and Laws Code Act. It provided for the establishment of the High Court and all the lower courts, the appointment of judges and the mufti, and the functioning of the whole judicial system and legal proceedings. It was followed, through Resolution No. 226 of 24 March 1948, by the Criminal Procedure Code (Amendment) Act I, applied to the 'areas … liberated from the Dogra Rule' and circulated among the sessions judges of Poonch and Mirpur and the district magistrates of Poonch, Mirpur and Muzaffarabad. It primarily regulated legal matters and the way in which the courts should operate in the new political reality. Another relevant act was Resolution No. 372, passed on 18 May 1948, which established the High Court of Azad Jammu And Kashmir. *None* of these legal acts referred to Pakistan in any way or acknowledged AJK as a part thereof. The only mention of Pakistan is in Article 5(3) of the 1949 Courts and Laws Code Act which regulated the appointment of judges. The Act provided that a person qualified for appointment as a judge of the High Court should have minimum experience as a judge in Princely State of Jammu and Kashmir (PSJ&K), or in Pakistan or England, i.e. adequate professional experience within the British legal system. The mention of Pakistan did not entail any unification of judicial systems of AJK and Pakistan, and Pakistan was treated as a foreign territory in the same way as England. These legal documents made no other mention of Pakistan or the subservience of the AJK judicial or administrative systems to those of Pakistan. Even in the case of appeals, the court

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of appeal for all civil and criminal courts was said to be the High Court of the Azad Jammu and Kashmir State (Artt. 13 and 18). In this way, the AJK system was treated as fully independent from Pakistan's rule.

Another important document was Azad Jammu and Kashmir Adaptation of Laws Resolution (AJKALR). The resolution listed a number of enactments that would come in force in the AJK territories and that had already been in force in West Punjab. Unlike earlier resolutions, it practically acknowledged that certain legal acts in force in Pakistan, esp. in West Punjab, could also be adopted and consolidated within the judicial system of AJK. Nonetheless, it did not carry even the slightest implication of a possible merger of Kashmiri and Pakistani laws. The previous laws were not sufficient to regulate all matters of the new state, and therefore Notification No. 3323 was promulgated in 1949. It followed the pattern of the earlier AJKALR. The Notification merely approved 'all laws and enactments of the old regime', i.e. of PSJ&K, except for those which were inconsistent with new regulations. In this sense, it was an endorsement of the continuity of the legal system within the territory of Kashmir. The independent character of AJK was further reinforced by the Azad Kashmir Government Legal Proceedings Abeyance Act of 1949 (under Cabinet Resolution No. 314/49), which provided for full legal immunity of the government 'till the question of the accession of Jammu and Kashmir State to Pakistan or otherwise *is finally decided*' (Artt. 4, 5), which inadvertently also acknowledged that certain actions of the government may be legally questionable.

In March 1949,[3] the Government of Pakistan established the Ministry of Kashmir Affairs (MKA)—later renamed the Ministry of Kashmir Affairs and Northern Areas (MKANA), and again the Ministry of Kashmir Affairs and Gilgit Baltistan (MoKGB) in 2009—which was an offshoot of the Indo-Pakistani Kashmir dispute. The Rawalpindi-based Ministry was initially meant to deal primarily with matters such as negotiations and contacts with United Nations (UN) representatives, implementation of agreements on Kashmir resulting from negotiations with United Nations Commission for India and Pakistan (UNCIP) and the UN representatives, administration of AJK, provision of relief to Muslim refugees from India-administered areas of Jammu and Kashmir and assistance and advice to the Azad Kashmir government.[4] However, the prerogatives of the Ministry were soon to expand significantly and it undertook administrative tasks as well. The ground for the functioning of the Ministry was prepared by the first Karachi Agreement (KA) signed on 28 April 1949 by Mushtaq Ahmad Gurmani, Minister 'without Portfolio' (the delegated officer for Kashmir affairs and the first minister of Kashmir Affairs) representing the Government of Pakistan, and two All Jammu and Kashmir Muslim Conference (AJKMC) representatives.[5] The Agreement defined the respective spheres of jurisdiction of the three authorities in running the administration of AJK, in carrying out policies with respect to the liberation movement of all the Kashmiri territories, in performing functions vis-à-vis the Kashmir dispute and representing the Azad

Kashmir side in the dispute and before UNCIP, a mediator-established pursuant to Article 34 of the UN Charter. Section III A of the Agreement specified the matters within the purview of the Government of Pakistan, which included the following: '(i) Defence (complete control over A.K. Forces), (ii) Negotiations with U.N.C.I.P., (iii) Foreign Policy of A.K. Government, (iv) Publicity in Pakistan and foreign countries, (v) Coordination of arrangements for relief and rehabilitation of refugees, (vi) Coordination of publicity and all arrangements in connection with the plebiscite, (vii) All activities within Pakistan itself with regards to Kashmir such as procurement of food and civil supplies transport, running of refugee camps, medical arrangements etc., (viii) All affairs of the Gilgit and Ladakh areas under the control of Political Agent at Gilgit'.

Initially, the role of the Government of Pakistan was to represent AJK internationally, in contacts with other states and the UN, in particular negotiations with UNCIP, and to handle all matters related to the plebiscite in which the population of PSJ&K was to determine the future of the territories. Section III B described the matters remaining within the purview of the Azad Kashmir government, which were restricted to the administration and supervision of administration in AJK, and also to the 'advice to H[on'ble] M[inister] without Portfolio with regard to negotiations with U.N.C.I.P'. The KA seriously restricted the powers of the Azad Kashmir government and opened avenues to much greater involvement in Kashmiri affairs by the Pakistan government. Furthermore, according to Section III C, the matters relating to political activities in AJK territories and among Kashmiri refugees in Pakistan, 'field work and publicity in Indian-occupied area of the State', preliminary arrangements in connection with and the organisation for contesting the plebiscite, and 'general guidance of the A.K. Government' came within the purview of AJKMC. This clause was to seal the one-party system in AJK and the political dominance of AJKMC, which received *carte blanche* to control all political affairs within the state. This move had a negative impact on further political and sociopolitical developments in AJK. The agreement was a decisive step in enabling a solid Pakistani grip over Western Kashmir, and its powerful right arm came to be MKA already in existence by this time.

The agreement was, for all practical purposes, 'one-party business': it was signed by two political party activists of AJKMC who could barely claim any popular representation: Sardar Muhammad Ibrahim Khan, a co-founder and member of AJKMC, who at that time held the position of the President of the provisional Azad Kashmir government, and Chaudhry Ghulam Abbas, the President of AJKMC, whose rule over AJK was not a result of any electoral process and could hardly be described as representative of the people of the region. In its significance and symbolism, the agreement could be comparable to the Instrument of Accession of the State of Jammu & Kashmir (IoAJ&K) through which India came to control Jammu and Kashmir. The exact circumstances surrounding the

signing of the agreement are shrouded in mystery and it remains debatable whether the agreement was signed at all. As Ahmad Hasan Dani (2001: 349) notes, 'It is believed that the provisional government did not sign a formal Instrument of Accession with Pakistan. Instead a wireless message was sent to the government of Pakistan'. Interestingly, Sardar Muhammad Ibrahim Khan is even alleged to have iterated that he had never signed the KA.[6] The consequential agreement and the confusion that surrounds it correspond to the allegations and doubts concerning the question of whether Hari Singh, the Maharaja of Jammu and Kashmir, ever signed the Instrument of Accession.

The agreement indirectly shaped the constitution and powers of the MKA, which was initially expected to deal only with matters relating to Kashmir dispute. It also shaped the style of the Pakistani government's control over Kashmir. Quite conspicuously, the Rules of Business of the Azad Kashmir government (RBAKG, No. 1/RS-AKM/50), issued on 28 December 1950, did not address the nature of the relationship between the governments of Pakistan and AJK and were as silent about the role of MKA as they were about Pakistan. Their main task was to regulate the functioning of the state and serve as a basic law. Issued by Chaudhry Ghulam Abbas, the President of AJKMC and the self-styled 'Supreme Head of the Azad Kashmir Movement', the Rules also made him 'the Supreme Head of the State' from whom all power flowed downwards. With formal powers comparable with, or perhaps even exceeding, those of Maharaja Hari Singh, he appointed the President and the Council of Ministers, all responsible directly to him, as well as the Chief Justice and the other judges of the Azad Kashmir High Court. The actual powers were significantly checked, however, by his dependence on Pakistan and, most significantly, by Pakistan's MKA.

The situation changed dramatically with the Rules of Business (RBAKG) revised in 1952, which assigned a vital role in the internal administrative affairs of AJK to the Ministry. The document was officially passed by AJKMC, as the single political party, but its formulations were, in practice, the result of the political will of MKA and catered to its needs.

With RBAKG (1952), the all-powerful Ministry, as an extension of the Government of Pakistan, assumed the upper hand in the appointments of all the important posts in AJK such as the President of AJK (Art. 5(a)), the Chief Justice and judges of the High Court (Art. 6), the Chairman and members of the Public Service Commission (Artt. 7, 10), all to be approved by MKA. The Ministry was also authorised to opine, revise and approve of all AJK legislation, the right to initiate which was formally vested with the council of AJKMC, in compliance with the one-party state principle (Art. 8). As a matter of fact, the powers of MKA extended far beyond appointments to the highest positions in the State and involved active interference with all administrative activities and cadre decisions such as appointments, promotions and disciplinary actions (Art. 21 and Schedule I, Rule 4).

Absolute control over Kashmiri affairs was exercised not only through legislative and administrative mechanisms but also directly through an MKA representative's personal presence and supervision of all governmental proceedings in AJK. Schedule IV, Rules 6 and 7, empowered the Joint Secretary of the Ministry of Kashmir Affairs to personally attend meetings of the Azad Jammu and Kashmir Council of Ministers and tender advice on any matter under discussion, and even to sanction matters, of major and minor importance, to be discussed thereby that fell under one of the fifteen subjects,[7] which practically exhausted all that was relevant to the functioning of the state.[8] The new set of Rules of Business (No. GB/15603-53/SG/58) came in force on 29 November 1958, soon after the military coup of General Ayub Khan. They retained all the provisions of the 1952 RBAKG that gave almost unlimited powers to the Ministry but replaced the office of the Joint Secretary of the Ministry of Kashmir Affairs with the Chief Adviser. The new political reality also led to the replacement of earlier MKA staff with military personnel or officers appointed by the military.

In practice, Jammu and Kashmir territories were ruled by Pakistan as its own by MKA; however, the pretence of a strongly limited autonomy for these territories was formally maintained. On paper, the territories preserved their quasi-independent and symbiotic character, but the actual liaison between Pakistan and AJK was that of subjection and subservience. AJK was not administratively turned into a district of Pakistan, but its sovereign powers over its own affairs were subject to such tight controls by Pakistan that they were rendered thereby fictitious.

Following Pakistan's Basic Democracies Order of 1959, the same regulations were enforced in AJK in 1960 through the following three related documents: Azad Jammu and Kashmir Basic Democracies Act (Act X of 1960), Azad Jammu and Kashmir Refugees Registration and Representation Act (Act XIII of 1960) and Azad Jammu and Kashmir Presidential Election Act (Act XIV of 1960). These were preceded by the Azad Kashmir Adaptation of Laws Act (Act I of 1959, Council Order No. 21/59) passed on 12 January 1959, i.e. a few months after the imposition of the martial law by Ayub Khan on 7 October 1958, through which the new rules of the game in Pakistan also had to be accepted in Kashmir, as notified in Article 3: 'The laws of Pakistan as contained in the Schedule to this Act and all rules, notifications and orders made thereunder and in force immediately before the commencement of this Act, are adapted and shall, as far as practicable, be in force in the Azad Jammu and Kashmir Territory subject to lie modifications as stated below…'.

The 1960 laws duly implemented the Pakistani-imposed idea of basic democracies by introducing a 12-member State Council to elect the President. Similarly, the members of the Council were elected by the Electoral College comprising the basic democrats from both AJK and Kashmiri refugees settled in Pakistan. Despite all the shortcomings, such as retaining the omnipotence of MKA in all external matters as well as in

most internal administrative matters, the new laws gave electoral rights to the people of AJK for the first time since the Partition, albeit in a most truncated, compromised and indirect form, and not through the general franchise.

In 1964, this system was transformed once more with the Azad Jammu and Kashmir Government Act (AJKGA 1964). The State Council was to have eight State Councillors elected by the basic democrats of AJK. The Chairman of the Council was not elected but appointed by the Chief Adviser of MKA under Section 4(1) and did not have to necessarily be an elected member of the Council. The Chairman so appointed by the Chief Adviser was the *ex officio* President of Azad Jammu and Kashmir under Section 7. The duration of holding the office and freedoms of the Chairman, and consequently of the President, were under the full supervision and control of the MKA Chief Adviser under Section 4(2). In 1965, the President was granted additional powers to nominate two members of the Council from among the refugees settled in Pakistan. All legislation to be undertaken by the State Council was strictly limited in scope and had to receive prior written consent from the Chief Adviser and its publication had to be authorised by him (Sections 10(2),(3) and (4)). Similarly, the functions of the Council were to be regulated and assigned by the Chief Adviser (Section 12) and so were the rules for carrying out the purpose of the Act (Section 15).

A revised Azad Jammu and Kashmir Government Act (AJKGA 1968) came into force on 17 September 1968. With eight members of the Council elected and four other members nominated by the Chief Advisor from amongst the refugees settled in Pakistan, it tilted the balance of power even more to the side of the Chief Adviser but, otherwise, retained the prerogatives and pivotal role of the Chief Adviser in the governmental structure of AJK as an exterior and overruling power delegated by the MKA (Sections 6(2) and (3), 7, 9, 17). In addition, the new Act gave the Chief Adviser the power to suspend or dissolve the State Council as well as declare a state of emergency in Azad Kashmir and to terminate it at his will.[9] What the revised Act changed was the procedure of the appointment of the Chief Adviser which came within the purview of the Azad Kashmir government but was subject to final approval by the Government of Pakistan.

As a result of all the laws enacted since 1950, including the Rules of Business of the Azad Kashmir government and the Azad Jammu and Kashmir Government Act in their various incarnations, changing every few months at the whimsey of the Pakistani government with no local input, AJK was effectively reduced to the status of a sub-dominion of Pakistan and divested of all its political representation, with its lawmakers deprived of all powers and subordinate to the MKA officers in a most humiliating manner.[10] The repressive grip exercised by the Government of Pakistan over Azad Kashmir territories was much more thorough, intense and pervasive than in the case of the constitutional territories of Pakistan, which could enjoy certain administrative and fiscal autonomy.

The tight control of Kashmiri affairs and contempt for Kashmiris' aspirations for self-rule led to a collaboration between rival political factions and leaders who had previously competed with each other, allowing Pakistani authorities to play them one against the other. United under the pressure of new circumstances, Sardar Muhammad Ibrahim Khan, the leader of AJKMC, Mohammad Abdul Qayyum Khan, the president of AJKMC, and Khurshid Hassan Khurshid, the founder of the Jammu Kashmir Liberation League, joined hands in August 1968 and demanded a constitution and representative government for Azad Kashmir.[11] After the takeover by General Yahya Khan on 25 March 1969, a caretaker government of Abdul Rehman Khan was installed in Muzaffarabad with the aim of responding to the demands for political autonomy and the representation of Kashmiris in their own affairs and the preparation of the new laws. One representative of each of the three political leaders was invited into the new government as ministers who were able to provide certain inputs to the new legislation. The result was what is still considered a legal instrument that gave considerable autonomy to AJK, the Azad Jammu and Kashmir Government Act (AJKGA 1970) adopted in 1970. Section 3 of the Act provided for a presidential form of government, for a legislative assembly and a president elected on the basis of the adult franchise exercised by the state subjects living in AJK and Pakistan. The AJK president was vested with powers to superintend, direct and control the work of the government (Section 10) and was an *ex officio* member of the Legislative Assembly. Through Section 14, the Legislative Assembly consisted of the president and 25 members, 24 of whom were elected directly on the basis of the adult franchise, with the other a woman elected directly by the 24 other directly elected members of the assembly. Section 4 provided the Legislative Assembly with powers to remove the President through a no-confidence resolution taken by at least one-third of the total number of its members.

In some ways, the new Government Act resuscitated the letter of certain provisions of the KA concerning the division of functions of the Government of Azad Jammu and Kashmir and of the Government of Pakistan. Section 19(1) and (2) defined the matters and subjects that remained within the jurisdiction of the Legislative Assembly, and these were also the matters over which the Government of Azad Jammu and Kashmir had executive authority. Section 19(3) explicitly excluded the legislative authority of the Assembly over the following matters: '(a) The responsibilities of the Government of Pakistan under the UNCIP Resolutions; (b) the defence and security of AJK; or (c) the current coin or the issue of any bills, notes or other paper currency', which remained under the exclusive control of the Government of Pakistan. These generally concurred with the provisions of Section III A of the KA.[12] Under the new provisions, especially Section 19, the Legislative Assembly was authorised to make all laws concerning all the territories of AJK as well as for all state subjects and government officers residing in Kashmir irrespective of their domicile. It was also given the powers

to repeal or alter previous laws in force within AJK. The Azad Jammu and Kashmir Government Act of 1970 retained the prerogatives of the Government of Pakistan which it had had under the UNCIP Resolutions and preserved a measure of defence and monetary union between Pakistan and AJK. With the Government of Azad Jammu and Kashmir regaining full authority in all internal administrative matters except currency-related matters, security and external relations concerning the determination of the future status of all Kashmir territories under the UNCIP process, the status of Azad Kashmir territories reverted to the considerable autonomy of 1948, and Pakistan recognised this status. Most importantly the new laws, which were not simply imposed on Kashmiris by Pakistan but were phrased with their participation,[13] contained no reference to the offices of the Joint Secretary or the Chief Adviser, and the only formal link between AJK and Pakistan was the juncture of the AJK President and the Pakistan government adviser (modelled after the British-era political agent), with whom the former was necessitated to consult in matters related to the UNCIP resolutions and defence. Section 28 directly refers to the role of the Government of Pakistan: 'Nothing in this Act shall derogate from the responsibilities of the Government of Pakistan in relation to the State of Jammu and Kashmir under the UNCIP Resolutions or prevent the Government of Pakistan from taking such action as it may consider necessary or expedient for the effective discharge of those responsibilities'.

The picture was not as optimistic as it is sometimes portrayed in the literature, however. The freedoms and autonomy of Azad Kashmiris were not unlimited: the Rules of Business promulgated in 1958 were not rescinded and remained in force, preserving Pakistan's grip. The new Azad Jammu and Kashmir Government Act also contained a loyalty clause imposed on Kashmiri politicians and government officers who were required to take the oath: 'I will remain loyal to the country and the cause of accession of the State of Jammu and Kashmir to Pakistan', which has become a standard oath to be taken by Jammu and Kashmir government ministers until today, after it was incorporated into the 1974 Azad Jammu and Kashmir Interim Constitution Act (AJKIC 1974).

Probably, what some[14] see as vagueness as regards the expression 'the country' in the clause may have been intentional, but a possible doubt as regards its meaning could easily be dispelled by an analysis of the text of the Azad Jammu and Kashmir Government Act as well as the contents of the Rules of Business in their different incarnations, and also of the text of the Interim Constitution. In all cases, whenever we come across the term 'state', either AJK or PSJ&K is meant, with 'country' found nowhere in the text except with respect to 'any other country', different from Jammu and Kashmir. Having this in view, loyalty to the 'country' cannot but mean 'loyalty to Pakistan', as a political entity other than the *State* of (Azad) Jammu and Kashmir. Nonetheless, the introduction of the loyalty clause with the emphasis on 'the cause of accession of the State of Jammu and Kashmir to Pakistan' reiterated the

undetermined status of the region as something more than a restricted self-government granted to any province of Pakistan, viz. Kashmir's formal separateness from Pakistan's all other territories, but clearly not its sovereignty or independence. The positive changes continued with respect to the judiciary of AJK. An Apex Court for Azad Jammu and Kashmir was created to review the decisions of the High Court, and the Government of AJK was entrusted with powers to appoint judges to the superior courts.[15]

The period of relative autonomy and Pakistani-controlled self-rule was rather short-lived. Pakistan's 'Second Partition' of 1971 led to an identity crisis, a forceful redefinition of what Pakistan is and of what it means to be a Pakistani, after more than a half of the Muslims of the 'first Pakistan' opted out of the 'State for all Muslims'. With the Prime Minister of Pakistan, Zulfiqar Ali Bhutto, a new constitution promulgated in 1973, and new provincial divisions, the situation matured to the point of the new prime minister making an attempt to 'provincialise' Azad Kashmir, or at least to 'Pakistan giv[ing] itself the legal scope to do so'.[16] Also, the presidential system introduced with AJKGA (1970), with the President to be removed from the office only through a no-confidence motion gaining the support of at least two-thirds majority of the Legislative Assembly, made the control of the head of the state less straightforward and rendered a President who was unacceptable to Pakistan almost immovable from the post. The reversal of such a political system in AJK became imperative for Pakistan.

The first, post-traumatic attempt to curb the liberties overhastily granted to the Kashmiris by the centre in Islamabad was a renewed set of the Rules of Business of the Azad Jammu and Kashmir (RBAKG) adopted in 1973, through which the role of the (now) MKANA was defined afresh. These were enforced in AJK by the Federal Government—as the 'the executive authority of the Federation … exercised in the name of the President' (CIRP 1973, Art. 90)—'in exercise of the powers conferred by Articles 90 and 99 of the Constitution of the Islamic Republic of Pakistan' (RBAKG 1973, Preamble), even though neither of the two articles referred to extended the rights of the Federal government to make laws in AJK. The document reasserted most powers which the Ministry already exercised, including (Art. 19):

1 'Policy, Administration and Development in Northern Areas,
2 Administration of Jammu and Kashmir State Property in Pakistan,
3 Relations with Azad Jammu & Kashmir Council and Azad Government of the State of Jammu and Kashmir,
4 Matters relating to the Settlement of Kashmir dispute, other than those falling within the purview of the Foreign Affairs Division,
5 Relief and Rehabilitation work in Northern Areas, including provision of civil supplies'.

The document retained the full powers and jurisdiction of the Government of Pakistan over NA disunited from Kashmir through the KA but did not

contain clauses endowing the Ministry with full powers to administer internal affairs and run the administration of Azad Kashmir. At the same time, to administratively liaise with AJK and run the full administration of NA, the Ministry was bifurcated into two respective wings.[17]

Notes

1. Schofield (1996: 119–164), Snedden (2012: 37–63).
2. For the text of the documents, see AJK Laws (2008).
3. Not in 1952, as Shekhawat (2007: 146) and others claim.
4. Nazimuddin (1952: 241), Snedden (2012: 341, n. 71).
5. See also ICG (2007: 5), Alam–Bali (2012: 20), Snedden (2012: 89 ff.).
6. Alam–Bali (2012: 52–53). See also Mahapatra–Shekhawat (2008: 76, n. 1): 'The then President of "AJK", Sardar Ibrahim Khan is reported to have stated, "Please do not blame me for this sin… I did not sign it (the Karachi Agreement). I want to clear my name while I am alive". This has led to doubt regarding the authenticity of the Karachi Agreement'. For his statement see, *The Kashmir Times*, May 5, 2003, p. 6.'
7. 'i. All questions of general policy. ii. All important matters involving heavy financial commitments on the Government level. iii. All matters relating to legislation, enactment of statutory rules, regulations and by laws requiring the sanction of the council. iv. State Budget. v. Alienation of State Property. vi. Internal Security. vii. Public Debts and Loans. viii. Foreign relations. ix. All important matters relating to Civil Supplies and Rehabilitation. x. All Forest schemes, leases and contracts exceeding the value of Rs. 50,000. xi. All Public works contracts exceeding the value of Rs. 50,000. xii. Grant of scholarships to students for study in Pakistan or abroad. xiii. Important matters relating to evacuees and evacuee property. xiv. Town improvement and development schemes. xv. Levy of new taxes and abolishing of existing taxes'.
8. Cf. Gilani (2015: 6–16).
9. Cf. Gilani (2015: 14–15).
10. Cf. Gilani (2008: 115).
11. Snedden (2012: 136–137).
12. On the basis of this, the High Court of Azad Jammu and Kashmir (APLD 1993: §§ 160–162, 129) opined, 'on the enforcement of the Act of 1970, the agreement in question (Karachi Agreement—P.B.) was superseded'.
13. Saraf (1977, II: 1371), Snedden (2012: 100).
14. Cf. Snedden (2012: 100): 'It was unclear what was meant by "the country"'.
15. Gilani (2015: 18).
16. Snedden (2012: 100–102, 136–138).
17. MKANA (2005–2006: 3).

5 Azad Jammu and Kashmir vis-à-vis Pakistan

The Constitution

Piotr Balcerowicz

The watershed legislation that determined administrative spheres and jurisdiction in Azad Jammu and Kashmir (AJK) and defined the relationship between the state and Pakistan for decades to come, without being rescinded and replaced with new laws after a lapse of a few years, was the Azad Jammu and Kashmir Interim Constitution Act (AJKIC) that replaced (AJKGA 1970). It was also the first and so far only document bearing the name 'constitution'. Similarly, no province of Pakistan has any legislative act under the title 'constitution', which makes AJK unique. The Interim Constitution was in itself an act of the Government of Pakistan which was presented to the Azad Kashmir Legislative Assembly on 24 August 1974 for approval and passed by it on the very same day.

The Preamble to the Interim Constitution makes it explicit that the Government of Pakistan, in phrasing the text themselves and imposing it on the Azad Kashmiris, used its special prerogatives which were understood to derive from international regulations under the United Nations (UN) negotiations scheme: 'in the discharge of its responsibilities under the UNCIP Resolutions, the Government of Pakistan has approved of the proposed repeal and re-enactment of the said Azad Jammu and Kashmir Government Act, 1970, and authorized the President of Azad Jammu and Kashmir to introduce the present Bill in the Legislative Assembly of Azad Jammu and Kashmir for consideration and passage'.[1] The regulations explicitly adduced as the basis to legitimize Pakistan's prerogatives in this case were the UNCIP resolutions, of which there were only two: those of 13 August 1948 (UNCIP 1948) and of 5 January 1949 (UNCIP 1949). It is doubtful, however, whether either of the UNCIP resolutions in question could really provide a legal sanction to the Government of Pakistan to draft the constitution and 'present' it to the Azad Kashmiris.

The first of these (UNCIP 1948) discusses the conditions for a ceasefire and truce agreement. The Government of Pakistan, and similarly the Government of India, agrees to 'issue separately and simultaneously a ceasefire order to apply to all forces under their control in the State of Jammu and Kashmir', and to follow other actions to secure the ceasefire order as described in Part I of the Resolution. In addition, as regards the duties and

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responsibilities of the Government of Pakistan, it unconditionally 'agrees to withdraw its troops from that State' (Part II, A(1)), and 'to secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistan nationals not normally resident therein who have entered the State for the purpose of fighting' (Part II, A(2)), while 'the Indian Government will maintain within the lines existing at the moment of cease-fire the minimum strength of its forces which in agreement with the Commission are considered necessary to assist local authorities in the observance of law and order' (Part II, B(2)). The resolution also stipulates that '[p]ending a final solution[,] the territory evacuated by the Pakistan troops will be *administered by the local authorities* (italics—P.B.) under the surveillance of the [United Nations] Commission [for India and Pakistan]' (Part II, A(3)). In view of this resolution, the temporary administration of the whole region should be carried out by the Government of the State of Jammu and Kashmir (Part II, B). The other responsibilities to be discharged are stipulated in Part I, E: 'The Government of Pakistan agree to appeal to their respective peoples to assist in creating and maintaining an atmosphere favourable to the promotion of further negotiations'; however, no mandate is granted to the Government of Pakistan whatsoever to *give laws* to PaJK or to administer the territories directly. However, as against the oft-mentioned claim that 'the administration of these territories (i.e. PaJK—P.B.) was entrusted to the Pakistan High Command under United Nations Security Council resolutions',[2] none of the UNSC resolutions or UNCIP resolutions in any explicit way gave full administrative powers to Pakistan or India over the territories of PSJ&K. The only references to the Pakistani High Command, or to the 'respective High Commands' of India and Pakistan, are found not in UNSC resolutions but only in UNCIP (1948) where the sides agree to a ceasefire and promise to respect its conditions and facilitate the ceasefire. In neither of them was Pakistan empowered in any way by the UN to administer the territories.[3]

The second resolution (UNCIP 1949) is meant to be 'supplementary to' (UNCIP 1948), and states that '[t]he question of the accession of the State of Jammu and Kashmir to India or Pakistan will be decided through the democratic method of a free and impartial plebiscite' (Art. 1) as well as urges both parties to follow the conditions required for it to be organized and conducted in an impartial manner under the supervision of the Plebiscite Administrator (Art. 3). Just as the first resolution, the second resolution does not envisage any administrative or supervisory role for the Government of Pakistan to play with respect to *any* part of the territories of the State of J&K or its laws to be binding there. The only section referring to the administrative duties of respective parties is Article 5: 'All civil and military authorities within the State and the principal political elements of the State will be required to co-operate with the Plebiscite Administrator in the preparation for and the holding of the plebiscite', and the manner of cooperation is described in detail in Article 7, but these rules primarily

concern the organization of the plebiscite and the situation leading to it. In fact, Article 7 imposes well-defined duties on all the parties in the preliminary period before the plebiscite is held, which may also involve administrative or military extension of Pakistani rule over the territories of Jammu and Kashmir controlled thereby: 'All authorities within the State of Jammu and Kashmir will undertake to ensure in collaboration with the Plebiscite Administrator, that: (a) There is no threat, coercion or intimidation, bribery or other undue influence on the voters in the plebiscite; (b) No restrictions are placed on legitimate political activity throughout the State. All subjects of the State, regardless of creed, caste or party, shall be safe and free in expressing their views and in voting on the question of accession of the State to India or Pakistan. There shall be freedom of the press, speech and assembly and freedom of travel in the State, including freedom of lawful entry and exit; (c) All political prisoners are released; (d) Minorities in all parts of the State are accorded adequate protections; and (e) There is no victimization'. None of these directives, however, authorizes Pakistan to define laws in the territories and offer them to local authorities in AJK 'for consideration and passage'.

It is quite puzzling why the legitimacy of the involvement of the Government of Pakistan in phrasing the Interim Constitution was buttressed solely by the reference to the UNCIP resolutions and no relevant UNSC resolutions were taken into account in the Preamble of the Interim Constitution, such as UNSC Resolution 47 of 21 April 1948, UNSC Resolution 51 of 3 June 1948, UNSC Resolution 80 of 14 March 1950, UNSC Resolution 91 of 30 March 1951, UNSC Resolution 96 of 10 November 1951, UNSC Resolution 122 of 24 January 1957 or UNSC Resolution 126 of 2 December 1957. However, in none of these cases did UNSC grant any administrative powers to the Government of Pakistan just as none of the UNCIP resolutions did.

In its Preamble, the Interim Constitution avers '… the future status of the State of Jammu and Kashmir is yet to be determined in accordance with the freely expressed will of the people of the State through the democratic method of free and fair plebiscite under the auspices of the United Nations as envisaged in the UNCIP Resolutions adopted from time to time'. In this context, the document also provides a rationale for why it was adopted: 'it is necessary to provide for the better Government and administration of Azad Jammu and Kashmir until such time as the status of Jammu and Kashmir is determined as aforesaid'. The Interim Constitution thus asseverates that the undetermined status of AJK is treated as provisional and temporary until its final determination, and nowhere in the Act is there any mention of Kashmir being a part of the Federation of Pakistan. The only reference to the status of the territory is another section of the Preamble which indicates that 'a part of the territories of the State of Jammu and Kashmir already liberated by the people are known for the time being as Azad Jammu and Kashmir'. This also underlines the fact that AJK should be understood as a temporary solution. The passage does not mention that the 'liberated

territories', after their 'liberation' ever joined or were incorporated within Pakistan. The abovementioned portion of the Preamble draws upon earlier UN resolutions and reiterates there that their legal status is yet to be determined; *ergo*, they cannot be treated as an integral part of Pakistan: 'The Government of India and the Government of Pakistan reaffirm their wish that *the future status of the State of Jammu and Kashmir shall be determined in accordance with the will of the people* (italics—P.B.)…' (UNCIP 1948, Part III), '…steps should be taken forthwith for the demilitarization of the State and for *the expeditious determination of its future in accordance with the freely expressed will of the inhabitants* (italics—P.B.)…' (Resolution 80 of UNSC, doc. S/1469, 14.03.1950) and 'the Governments of India and Pakistan recognize and accept the provisions of its resolution 38 (1948) of 17 January 1948 and of the UNCIP resolutions dated 13 August 1948 and 5 January 1949, which envisage in accordance with their terms *the determination of the future status of the State of Jammu and Kashmir in accordance with the will of the people through the democratic method of a free and impartial plebiscite* (italics—P.B.)…' (Resolution 126 of UNSC, 2.12.1957). The Preamble clause of the yet-to-be-determined status finds its counterpart in Pakistan's following declaration: 'When the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of the people of that State', which was incorporated in all three constitutions of Pakistan as Article 203 (1956), Article 221 (1962) and Article 257 (1973).

In consonance with previous legislation, the Preamble of the Interim Constitution symbolically expresses two ideas that seem contradictory. On the one hand, there is the acknowledgement of Kashmir's indeterminate status, which entails that it cannot be treated as a part of either Pakistani or Indian territory. On the other, Pakistan assigns to itself the role of the supreme legislator of the territories (unwarranted by UN resolutions invoked in support).

In this mixed bag of legislation, which includes the Interim Constitution, Section 4(4) 5. on 'Freedom of movement' provides that '[s]ubject to any reasonable restrictions imposed by law in the public interest, every State Subject shall have the right to move freely throughout AJK territory and to reside and settle in any part thereof'. In this, it appears to treat the territory in the same manner as a territory of any independent state within which the citizens, or state subjects, are free to move. At the same time, it does not extend this principle of the freedom of movement of 'every State Subject' unconditionally to any part of Pakistan. Alternatively, the *formal legal* situation concerning the freedom of movement of Kashmiris, the way it is *phrased*, could be compared to the similar both formally and practically highly restricted 'freedom' of movement of Palestinians currently contained within the Gaza Strip and barred from travelling to the other Palestinian territories of the West Bank or from entering any neighbouring states such as Egypt or Israel. These constitutional provisions for the freedom of movement are not unequivocal.

A number of sections seal Pakistan's superior position, the most crucial being Sections 19, 21, 31, 33, 53 and 56.[4] The Interim Constitution provides for a rather atypical bicameral structure of power, separate from the executive powers of the Government of Azad Jammu and Kashmir. It is sometimes maintained that it established two executive forums, i.e. the Azad Kashmir government with its seat in Muzaffarabad and the Azad Kashmir Council with its seat in Islamabad,[5] albeit the situation is much more complex with the Azad Kashmir Council, it being a joint forum of the representatives of the Pakistani Government and the Kashmiri population, unusual in having both superior executive (Sections 19(3) and 21(7)) and superior legislative (Section 31) powers with respect to both the Government of Azad Jammu and Kashmir and the Legislative Assembly, a Kashmiri representative elected body.

In regard to lawmaking in AJK, an atypical system of two chambers are envisaged by the Interim Constitution. The first, which has the upper hand in all decisions, is the Azad Jammu and Kashmir Council (Section 21), which consists of the prime minister of Pakistan, the president of Azad Jammu and Kashmir, five members nominated by the prime minister of Pakistan from amongst federal ministers and members of Pakistan's parliament, the prime minister of AJK or his representative, six members elected by the Legislative Assembly from among state subjects (i.e. Kashmiris) and *ex officio* the federal Minister of State for Kashmir Affairs and Northern Affairs (sic!) with no voting powers. This collective body is a mix of Pakistani and Azad Kashmiri officers and politicians representing the interests of both parties. The Constitution of the Azad Jammu and Kashmir Council and formal distribution of seats is as shown in Table 5.1 below.

On paper, it would seem that on the occasion of taking a vote, the majority of votes would be on the Kashmiri side (eight against seven Pakistani votes). However, a number of other legal and political mechanisms make Kashmiri representatives dependent on the will of the political centre in Islamabad. In legal terms, most importantly, Section 21(7) (amended in 1975) directs that '[t]he executive authority of the Council shall extend to all matters with

Table 5.1 The Constitution of the Azad Jammu and Kashmir Council

Pakistan (7 members)	*AJK (8 members)*
The Prime Minister of Pakistan, i.e. the Chairman of the Council (21(1)a, 21(2))	The President of Azad Jammu and Kashmir, i.e. the vice-Chairman of the Council (21(1)b, 21(3))
Five Members to be nominated by the Prime Minister of Pakistan (21(1)c))	The Prime Minister of Azad Jammu and Kashmir or his representative (21(1)d))
The Federal Minister of State for (sic!) Kashmir Affairs and Northern Affairs (21(3A), amended 1976) with no vote powers	Six members (state subjects) elected by the Assembly (21(1)e))

respect to which the Council has power to make laws and shall be exercised, in the name of the Council, by the Chairman who may act either directly or through the Secretariat of the Council…', which effectively concentrates all executive powers in the hands of the Prime Minister of Pakistan, and makes the 'Azad Kashmir segment' of the collective body subordinate to its 'Pakistan part'. In this manner, a direct and personal supervision of all important Kashmiri affairs by Pakistan's prime minister is secured. Section 21(12) allows for the interpretation that decisions taken by the chairman in the name of the council are irrevocable and their validity cannot 'be called in question on the ground that it is not an order or instrument made or executed by the Council'. It is not a negligible factor that the site of the Council is Islamabad and all its sessions take place in the capital of Pakistan, which allows for greater practical control of the functioning of the Council and the movements of its members.

It is most debatable whether, as Snedden (2012: 103) suggests, '[t]he council also gave Azad Kashmiris more higher-level representation at the federal executive level than any province, and it ensured that senior Azad Kashmiri politicians, unlike provincial chief ministers, had regular access to Pakistan's prime minister'. Logically, the issue of representation was quite the converse: it was not the Azad Kashmiris who were given higher-level representation at the federal level but rather the central federal powers were given direct and unrestricted control over all important legislative and executive decision-making within the executive authorities and the legislature of AJK, in which AJK ceased to be controlled from the back seat, rather the prime minister became the actual driver and decision maker introduced directly into the power structure of AJK. It is true that the council came to play the role of a forum in which Kashmiri politicians could debate with Pakistan's highest executive face to face, but this gave them no influence or control over the federal decision makers, quite the reverse. These are the reasons why the AJK Council, an institution which is answerable neither to the AJK assembly or any other AJK institution nor to any Pakistani assembly, is opposed by many Kashmiris, who openly protest against it,[6] and prominent local lawyers and politicians, including leaders of the United Kashmir People's National Party, or Raja Farooq Haider Khan, the current AJK prime minister, who demand the abolition of the council and the transfer of all its powers to the AJK government to ensure the full empowerment of the elected government,[7] and why the Pakistan Army does all it can to silence both the protests and any information about them as well as actively censors local media.[8]

The other chamber in the bicameral structure is the Legislative Assembly (Section 22), which consists of 49 (amended 1986) members. These comprise 41 (amended 2005) members elected directly on the basis of the adult franchise, five women (amended 1975) elected by the directly elected members of the Assembly, one religious scholar or Muslim cleric ('from amongst the Ulema-e-Din or Mushaikh'), one representative of the Kashmiri refugees ('one from

amongst the Jammu and Kashmir State Subjects residing abroad') and one technocrat or professional, all three elected by the directly elected members (Section 22(1)). For the purposes of the Interim Constitution, state subjects are defined (Section 2) as the population of the former PSJ&K who reside in Pakistani-administered territories or in Pakistan itself, i.e. Pakistani passport holders, and does not, even potentially, include the state subjects resident in Indian-administered territories. The prerogatives (Section 31; Third Schedule) determine the subordinate character of the Legislative Assembly. The Interim Constitution extends to all Azad Kashmiris (state subjects) and Kashmiri refugees in Pakistan and to everyone residing in Pakistani-administered territories of the former State of Jammu and Kashmir and also to the members of both chambers.[9]

The legislative powers of the Islamabad-controlled AJK Council are listed enumeratively in extensive Third Schedule and these are exclusive rights of the Council, barred from the Legislative Assembly (Section 31(2)(a)). They include 52 entries, leaving hardly anything untouched: the movement of people, citizenship and nationalization matters, post and communication, newspapers, media and books, the banking system, currency and finances, insurance, education and research, tourism, aviation, copyright protection, opium export, highways and strategically important roads, railways, the census, polls and statistics, standards of weights and measures, energy resources (esp. mineral oil, natural gas) and nuclear energy, electricity, the development of industries of public interest, state property, the jurisdiction over police forces in AJK, jurisdiction over prisoners, jurisdiction over courts with respect to specified issues, control of crime with respect to specified issues, etc. What is left concerns strictly local issues or those of minor importance, and these remain under the jurisdiction of the Assembly (Section 31(2)(b)).

The bulk of the actual power, legislation and jurisdiction remains within the Council. Excluded from the legislative powers of both chambers are issues which fall under sections (i)–(vii) of the 1948 Karachi Agreement, which had effectively handed over all jurisdiction over these matters to the Government of Pakistan, namely '(a) the responsibilities of the Government of Pakistan under the UNCIP Resolutions; (b) the defence and security of Azad Jammu and Kashmir; (c) the current coin or the issue of any bills, notes or other paper currency; or (d) the external affairs of Azad Jammu and Kashmir including foreign trade and foreign aid' (Section 31(3)). The Karachi Agreement has never been revoked by any act and hence retains its legal validity and remains binding to date. Accordingly, since the Agreement is still in force and all legislation with respect to AJK, either at federal or Kashmiri level, always passed the jurisdiction over these matters to the Government of Pakistan, there was no obvious need to mention this in the Interim Constitution. The exclusive prerogatives of the Government of Pakistan in this respect are also clearly specified in Section 56. In other words, the Government of Pakistan, either directly or acting through the

prime minister as the chairman of the Council, exercises unrestrained control over most legislative issues.

As regards executive powers, Section 19 of the Interim Constitution gives the final say in all matters to the Council, the chairman of which is the prime minister of Pakistan and who has the powers to override the decisions of the AJK government. The latter, as well as the AJK president, must act on the advice, i.e. directive, of the Chairman of the Azad Kashmir Council, i.e. Pakistan's prime minister. The extent of executive authority of government covers all matters with respect to which the Legislative Assembly has the power to make laws (Section 19(1)). It is also limited by specified powers of the Government of Pakistan (Section 19(2)a) and by the legal requirement of its compliance with the Laws made by the Council (Section 19(3)b). In addition, any powers of the AJK government may be entrusted, either conditionally or unconditionally, to the Council.

The distribution of powers of the Council, Legislative Assembly and the Kashmiri government cannot be changed or amended in any way. As Section 33 rules, no amendment can be made to the constitution which would concern Section 31 (on legislative powers), which, in turn, automatically entails the Third Schedule to which Section 31(2)(a) refers, or Section 56 (see next), unless approved by the Government of Pakistan. Amendments, to be initiated either by the Council of the Assembly are possible only within the tightly restricted limits defined as the matters not mentioned in the Third Schedule and ultimately have to be approved by a joint sitting of the Assembly, the Federal Minister in-charge of the Council Secretariat and the elected members of the Council, which again gives control over all amendments which exclusively concern local matters of the Azad Kashmiris to the Government of Pakistan.

As if all the foregoing provisions were not sufficient to buttress the superiority of Pakistan with respect to the legislature and executive of AJK, with Section 56, the Interim Constitution Act grants complete control over most matters in AJK to the Government of Pakistan and provides for the Pakistani government's upper hand in all important decisions: 'Nothing in this Act shall derogate from the responsibilities of the Government of Pakistan in relation to the matters specified in sub-section (3) of Section 31[10] or prevent the Government in Pakistan from taking such action as it may consider necessary or expedient for the effective discharge of those responsibilities', which includes the Pakistani government's right to dismiss any elected Government of AJK irrespective of the size of support it may enjoy in the AJK Legislative Assembly or among the population.[11] These are considered both inalienable and exclusive powers which the Government of Pakistan has over matters of the territories, and the rather imprecise and vague phrase 'such action as [the Government in Pakistan] may consider necessary or expedient for the effective discharge of those responsibilities' invests it with legal and executive omnipotence, which no institution in AJK may ever contest.

Section 56 is not a mere theoretical legal device. It was, for instance, invoked on 31 October 1978 by Muhammad Zia ul-Haq to dismiss Sardar Muhammad Ibrahim Khan and replace him as AJK president with (then) Brigadier Muhammad Hayat Khan, who was at that time also Chief Executive, i.e. AJK prime minister. The second time Pakistan invoked Section 56 was on 5 July 1991 when Nawaz Sharif, Pakistan's prime minister, dismissed Raja Mummtaz Hussain Rathore, who suspecting the elections in which Nawaz Sharif-supported Muslim Conference had won an overwhelming majority despite all previous expectations were rigged had declared them null and void.[12] Through Section 56, Pakistan can freely appoint functionaries who are designated by the constitution as exclusively elected office holders, such as the AJK president against the provisions of Section 5 ('There shall be a President of Azad Jammu and Kashmir, who shall be *elected*…') or the Prime Minister against Section 13(2) ('the Assembly shall … proceed *to elect* … of its Muslim members to be the Prime Minister'), or at will merge any offices of, for example, the president and prime minister, into one *appointed* (not elected) person even though no section of the Constitution allows for such an action, except Section 56. No other constitutional legislation, whether in India, IaJ&K, Pakistan or the Pakistani provinces, grants such unrestricted powers to the central government who can override any provisions of respective constitutions or other legal acts.

The Government of Pakistan has no need to invoke Section 56 to steer matters in AJK and impose its will and its politicians there. A good illustration is provided by General Pervez Musharraf who enforced his nominee Major-General (retd.) Sardar Muhammad Anwar Khan as the AJK president through a controlled election in the joint sitting of the Legislative Assembly and the Council in on 25 August 2001, despite the fact that Sardar Anwar Khan had retired from the army as Vice Chief of General Staff (VCGS) shortly before and was barred from taking any civilian office until two years had elapsed.[13]

Through Section 53, the Government of Pakistan has also the right to issue a proclamation of a state of emergency in AJK through the person of the Chairman of the Council, i.e. the Pakistani prime minister. He advises, i.e. orders, the AJK president to issue such a proclamation in the case that 'the security of Azad Jammu and Kashmir is threatened by war or external aggression or by internal disturbances'. This is again a powerful legal tool which grants 'power to suspend fundamental rights' to the President acting at the advice of the Chairman, i.e. the Pakistani prime minister (Section 54), and can be used to quell any kind of dissent or eliminate political disagreement.

The Interim Constitution imposed a loyalty clause on all senior Kashmiri politicians and high-ranking government officers, the contents of which is same as in The Azad Jammu and Kashmir Government Act of 1970. The President (Section 5(6)), the Prime Minister (Section 13(4)), Ministers (Section 14(2)), Speaker and Deputy Speaker of Legislative Assembly

(Section 29(2)), members of the Council (Section 21(6)), members of the Assembly (Section 23) and Advisor (Section 21(9)) of AJK are required to take an oath of loyalty consistently containing the same formula: 'I will remain loyal to the country and the cause of accession of the State of Jammu and Kashmir to Pakistan' in the shape set out in the First Schedule of the Interim Constitution. As in all previous cases, loyalty to the 'country' means 'loyalty to Pakistan'. Failure 'to make the oath referred to in (respective) section' within a prescribed period results in the immediate vacancy of the respective seat or office (Sections 21(4-A)(c) and 25(1)c). Conspicuously, the members of the Government, the Council and Legislative Assembly are in the first place obliged to remain loyal to, and their accountability is primarily with, Pakistan rather than with their own Kashmiri electorate and the people of AJK they are supposed to represent. In addition, the loyalty oath predetermines the tenor of all political activities undertaken by senior office holders in AJK, which should be devoted to 'the cause of accession of the State of Jammu and Kashmir to Pakistan'. It effectively bars them from freely discussing the future status of Kashmir, including the options of either the independence of the Kashmiri territories or their accession to India. Paradoxical in nature, the oath seems clearly inconsistent with the assumption expressed in the Interim Constitution that 'the future status of the State of Jammu and Kashmir is yet to be determined *in accordance with the freely expressed will of the people of the State* (italics—P.B.) through the democratic method of free and fair plebiscite under the auspices of the United Nations as envisaged in the UNCIP Resolutions adopted from time to time'.

This actual ban on any ideology other than the 'accession to Pakistan' negatively impacts freedom of speech in AJK and excludes most political views and groupings from public life or the electoral process. It evidently stands in contradiction with Article 257 of the 1973 Constitution of Pakistan.[14] As it is widely known and reported, legitimate parties and 'political groups such as the JKLF and the APNA that do not support Kashmir's accession to Pakistan are barred from contesting elections. When their members have attempted to field candidates, as they did in the 2001 and 2006 elections to the AJK Legislative Assembly, the authorities have sought to suppress them, including the use of arbitrary arrest often accompanied by illtreatment'.[15] The prohibitive measures are on massive scale, for instance '[a]bout sixty pro-independence candidates belonging to the Jammu Kashmir Liberation Front, the All Parties Nationalist Alliance and some smaller groups filed nomination papers for the July 11, 2006 elections. All were barred from the contest by election authorities'.[16]

At the same time, this paradox also sets certain standards for all legislation concerning AJK in other spheres, in particular with respect to any public or political activity. The Interim Constitution guarantees freedom of association through Section 7(1): 'Subject to this Act, every State subject shall have the right to form association or unions, subject to any reasonable

restrictions imposed by law in the interest of morality or public order'. In addition, through Section 9, it provides for the exercise of freedom of speech, albeit this is not unlimited: 'Every State subject shall have the right to freedom of speech and expression, subject to any reasonable restrictions imposed by law in the interest of the security of AJK, friendly relations with Pakistan, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence'. At the same time, Section 4.7(2) explicitly rules out anything that would not be in line with the accession-to-Pakistan imperative: 'No person or political party in Azad Jammu and Kashmir shall be permitted to propagate against, or take part in activities prejudicial or detrimental to, the ideology of the State's accession to Pakistan'. On the one hand, the Act promises that the final status of Jammu and Kashmir is yet to be resolved through a plebiscite in which state subjects should be guaranteed to exercise their free will and make a choice, but the choice is eventually determined to be one and only one alternative: Kashmir's accession to Pakistan. Any other option in public discourse is illegal.

This only-one-alternative 'freedom' of speech also translates to restrictions imposed on journalism or any political activity, including contesting elections. Through Section 33 of the Azad Jammu and Kashmir Political Parties Act, 1986, amended in 1991, the political parties which want to contest the elections have to proclaim that the accession of Jammu and Kashmir with Pakistan is final and irreversible: 'No person or political party in Azad Jammu and Kashmir shall be permitted to propagate against or take part in activities prejudicial or detrimental to the ideology of the State's accession to Pakistan'.[17] Section 9 of the same Act states that any party is barred from contesting elections and stands dissolved if it 'propagates any idea other than the accession to the state of Pakistan'.[18] In the same spirit, Article 5(b) Section (vii) of the Azad Jammu and Kashmir Legislative Assembly Election Ordinance 1970 states that a member will be disqualified from contesting an election if 'he is propagating any opinion of action in any manner prejudicial to the ideology of Pakistan, or the sovereignty, integrity of Pakistan or security of Azad Jammu and Kashmir or Pakistan or morality or the maintenance of public order or the integrity or independence of the judiciary of Azad Jammu and Kashmir or Pakistan or who defames or brings into ridicule the judiciary of Azad Jammu and Kashmir or Pakistan or the Armed Forces of Pakistan'.[19]

The control of the Azad Jammu and Kashmir Council exercised by the Prime Minister of Pakistan, who holds the office of the Chairman of the Council with all executive powers, also extends to all elections held in the territories. The supervision of elections is entrusted to the AJK Chief Election Commissioner, provided for by Section 50 of the Interim Constitution. This section is evoked in all relevant electoral laws in the territories. The role of the president in the appointments procedure of the Chief Election Commissioner is rather ceremonial, inasmuch as he has to act 'on the advice of the Council' or its Chairman.

The Chief Election Commissioner not only organizes and coordinates but has all full supervisory powers in elections for all important offices, such as the President,[20] the Legislative Assembly[21] and the AJK Council.[22] He is also responsible 'for the preparation of electoral rolls for' any kind of elections.[23] All these extensive powers of the Commissioner, and indirectly of the Prime Minister of Pakistan who appoints him and is thereby effectively in charge of the electoral machinery in AJK, translates into Pakistani-controlled elections which are held in the AJK territories in a way which is far from free, fair and transparent and instead are regularly dismissed as unrepresentative, unfair, rigged, marred by fraud, vote buying or violence and harassment.

This is an important reason for various election-related phenomena, such as the odd parallelism between the ruling party in Islamabad and the party subsequently winning elections in AJK. In the 1996 elections, when Benazir Bhutto was Pakistani prime minister, the Azad Kashmir People's Party (AKPP), an extension of the Pakistan People's Party, emerged with a majority of the seats. After the elections in July 2001, whilst acting as the Chief Executive of Pakistan, General Pervez Musharraf, who had deposed Prime Minister Nawaz Sharif in a military coup, installed his own candidate as the AJK president later that month. In 2006, during the Musharraf era, the pro-Islamabad Muslim Conference won the elections, just as it did in 2001, with Musharraf's nominee Sardar Attique Ahmad Khan becoming prime minister. During the tenure of Yusuf Raza Gilani, the Pakistan People's Party's prime minister of Pakistan, the 2011 elections ended with its extension, the AKPP, winning the highest number of seats. During Nawaz Sharif's prime ministership in Islamabad, his Pakistan Muslim League-Nawaz secured a simple majority of seats (31 out of 41) in the Azad Jammu and Kashmir Legislative Assembly Elections 2016. A good summary of the situation is provided by Freedom House reports (FH JK 2010, 2011, 2012, 2013): 'Even when elections were held, Islamabad's influence over the voting and governance remained strong, and few observers considered the region's elections to be free or fair'. The background of such situations is easily understood, if only for the legal dependencies of the administration and politics of AJK on the will of the federal government in Islamabad, which is cemented by the legislation.

Pakistan has always exercised its unlimited powers in AJK irrespective of the legislative constraints which have regularly been rephrased at will to justify the actual political situation through newly adopted laws. For instance, Sections 21 and 53A, alongside four other amendments, were inserted in the Interim Constitution in 1977, after General Zia ul-Haq had staged a coup. These secured unrestricted powers in Kashmir for the 'Chief Executive of Pakistan', i.e. General Zia, who unconstitutionally imposed martial law on AJK.[24]

From the very beginning of the Kashmiri-Pakistani liaison, Pakistan has made the Kashmir territories totally dependent in terms of finances on the

Pakistani government. This dependence is not only practical but also finds legal expression: every expenditure in AJK has to be approved by the chairman of the Council, i.e. by the prime minister of Pakistan (AJKIC 1974, Sections 37(2)A and (4)). The whole budget of the territories forms a part of the so-called Consolidated Fund (Section 37A), which is also under the indirect control of the federal Government of Pakistan.

The dependence of AJK on Pakistan is not only sealed by laws and various other instruments but also by the fact that practically all civil and police administrative posts of importance in the territories are occupied by Pakistani civil servants and military officers who are nominated following Pakistan's deputation policy imposed on AJK. As a former president of Azad Kashmir aptly described the situation in an interview with Human Rights Watch, it is a '[g]overnment of Azad Kashmir, by the Pakistanis, for Pakistan'.[25] He compared the system of Islamabad's dominance over the territories to the 'old princely system' under British rule with the role of 'viceroy' assumed by the representative of Islamabad.[26] Representatives of the Pakistani government are barred from obtaining a state subject status, but the actual rule of Kashmiri territories is by non-state subjects from Pakistan, which is in contravention of existing laws and UN resolutions that clearly decree that 'the territory … will be administered by the local authorities' (UNCIP 1948).

Pakistani dominance over AJK is often met with resistance, including legal process, though these are rare due to political, administrative, financial or informal pressures on Kashmiri activists to silence their dissent and suppress their dissatisfaction with the omnipotence of Pakistan's agencies, army and bureaucrats. For instance, while heading a three-member bench on 15 March 2010 concerning appointments to the AJK superior judiciary,[27] the incumbent Chief Justice of AJK Riaz Akhtar Chaudhry challenged the authority of the Pakistan Supreme Court on the issue of the 'unconstitutional appointment of AJK chief justice' and also passed an order barring the prime minister of Pakistan from passing any notification regarding the Chief Justice of AJK. The AJK Supreme Court bench passed an order which stated: 'The Supreme Court of Pakistan has no jurisdiction to entertain any petition regarding appointment of judges of superior courts of AJK. Such kind of petition does not come within the jurisdiction and sphere of Supreme Court of Pakistan'. The justification for the order was that 'The Supreme Court of Pakistan has no authority to extend its jurisdiction to the area of AJK because the territories of Pakistan have been defined in Article 1 of the Constitution of Islamic Republic of Pakistan. The Supreme Court of Pakistan cannot go beyond the territories defined in Article 1 of the Constitution of Islamic Republic of Pakistan'.[28]

Sometime earlier, in 2004, two lawsuits were filed by Kashmiris concerning a dispute over a payment for a plot of land, one to the Civil Court in Muzaffarabad by Muhammad Siddique Rathore and another one to the Civil Court in Islamabad by Muhammad Muzaffar Khan, who also

applied to the Muzaffarabad Court that the suit filed against him at Muzaffarabad be kept in abeyance until a disposal of the suit filed by him at Islamabad. His application was rejected by the Muzaffarabad Court on the grounds that 'Courts of Pakistan are foreign Courts—Judgment and decrees passed by those Courts [a]re not executable in Azad Jammu and Kashmir under any provision of law'. A revision petition against the judgement was directed to the AJK High Court and ultimately decided by Justice Muhammad Riaz Akhtar Chaudhry on 29 December 2004 (C.R. No. 144 of 2004; PLJ 2006 AJ&K 1). The defendant argued 'that *the Court of Civil Judge Islamabad is a foreign Court* (italics—P.B.) and under Section 10 CPC the trial Court of Muzaffarabad was not legally competent to keep the proceedings in abeyance, on the basis of the proceedings *sub judice* in a foreign Court. He further contended that when the Court of Islamabad is a foreign Court and a decree of that Court is not executable in Azad Jammu & Kashmir, then how the proceedings in Azad Jammu & Kashmir Court could be stayed'. This plaintiff's petition was dismissed; however, not on the grounds that the Court of Islamabad is a foreign court, but merely on the ground that 'the pendency of a suit in a foreign Court does not preclude the Courts in Azad Kashmir from trying a suit founded on the same cause of action'. Most importantly, the judge decisively concurred with the contention that '*the Courts in Pakistan are all foreign Courts* so far as the Azad Kashmir is concerned, and *the judgments passed by them are foreign judgments* (italics—P.B.)', and that 'the judgments and decrees passed by those Courts are not executable in Azad Jammu & Kashmir under any provision of law'. In addition, he drew attention to the fact the foreign status of Pakistan's courts had 'already been held in number of cases by the superior Courts of Azad Kashmir out of which PLD 1954 AJ&K 1 and PLD 1976 AJ&K 9 may be referred to'. We can, therefore, speak of an established judicial practice in AJK that advocates the autonomous, semi-independent status of the region.

Despite strong resentment among the residents, the territories of AJK are in many ways treated by the authorities of Pakistan as integral territories or administrative units of Pakistan, with the federal Government of Pakistan and Pakistani military and intelligence having the final say in all vital matters, and with Pakistani officers holding most vital posts. On the other hand, formally and legally, the dependent territories are not integrated into Pakistan as dominions whose status is yet to be determined, and with a population which cannot enjoy fundamental rights which citizens of a country should, being deprived of most constitutional rights the citizens of Pakistan can at least in theory enjoy. At the same time, we can notice a strong determination among the elites of AJK, including the judiciary, to resist all attempts on the part of Pakistan aimed at the incorporation of AJK territories, and also the entire realm of the former PSJ&K, into Pakistan. All this puts AJK and its population into a state of legal limbo, with undetermined legal status, unrestricted powers of Islamabad and highly constrained civil

and human rights, a situation in some ways worse than formal occupation, under which the residents would at least enjoy protections under respective international law, including the Geneva Convention of 1949.

Notes

1. There is nothing like the preamble mentioned by Justice Syed Manzoor H. Gilani, Judge Supreme Court of Azad Jammu and Kashmir to the effect: 'The Azad Jammu and Kashmir Interim Constitution Act, 1974 specifically mentions in its preamble that this constitution "is given by the Government of Pakistan to the President of Azad Jammu and Kashmir for consideration and passage by the Legislative Assembly of AJK"' (Gilani 2009).
2. See, e.g., PILDAT (2011a: 9).
3. To the contrary, the first of them, Resolution on Assurances, stated in clear terms that, '1. Responsibility for the security of J&K rests with Government of India. 2. The sovereignty of the J&K Government over the entire territory of the State shall not be brought under question. 3. There shall be no recognition of the so-called Azad (Free) Kashmir Government. 4. The territory occupied by Pakistan shall not be consolidated to the disadvantage of the State of Jammu and Kashmir'.
4. Snedden (2012: 104) emphasises that '[t]hree sections of the Interim Constitution that related to Pakistan also ensured its superior position: Sections 31, 53, and 56', but the legal situation is more complex and Pakistan's superiority is embedded in a number of other sections.
5. Cf. HRW (2006: 27).
6. For instance, the protests in March 2018 in cities across AJK, see: BS (2018-03-08).
7. *Nation* (2018-03-06).
8. See, e.g., SN (2018-06-19).
9. Both chambers have the power to make laws '(a) for the territories of Azad Jammu and Kashmir; (b) for all state subjects wherever they may be; and (c) for all officers of the Council or as the case may be, the Government, wherever they may be'.
10. '(a) The responsibilities of the Government of Pakistan under the UNCIP Resolutions; (b) the defence and security of Azad Jammu and Kashmir; (c) the current coin or the issue of any bills, notes or other paper currency; or (d) the external affairs of Azad Jammu and Kashmir including foreign trade and foreign aid'.
11. See also HRW (2006: 27).
12. Snedden (2012: 105–107).
13. Snedden (2012: 107).
14. JKCHR (2008: 5): 'Article 257 of the constitution of Pakistan allows a freedom of choice to the people of Kashmir. But the establishment in practice does not allow a "free vote", a "popular legislature" and a "popular Government" in Azad Kashmir and Gilgit and Baltistan. There is a gap between life as a process and life as a quality in the two administrations controlled by Pakistan'.
15. In 2001, HRW (2006: 41).
16. HRW (2006: 47).
17. Pattanaik (2008: 170), cf. Alam–Bali (2012: 32).
18. Pattanaik (2008: 170), cf. Alam–Bali (2012: 32).
19. Pattanaik (2008: 170).
20. AJKIC (1974, Sec. 5); AJKPER (1985, Sec. 3).

21. AJKLAEO (1970, Sections 3, 4, 4A, 6, 8, 9, 10, 13, 18, 19, 24, 28, 35, 38, 41, 42, 43, 47A, 47B48, 49); also AJKIC (1974, Sec. 25(2)).
22. AJKCEA (1977, Sec. 3); also AJKIC (1974, Sec. 21(4B)).
23. AJMKERO (1970).
24. Snedden (2012: 105–106).
25. HRW (2006: 28).
26. See also Behera (2006: 177–194).
27. See the petition to the Supreme Court of Pakistan, the summary under number Law–3/3/2002-AJKC (Pt), 25.06.2008.
28. Manzoor (2010), Sehri (2013: 1282).

6 Pakistan vis-à-vis Gilgit-Baltistan

Piotr Balcerowicz

So far we have discussed only one part of the territories of the former PSJ&K held by Pakistan. These were split in two, the other being Pakistani-administered agencies of Gilgit-Baltistan (GB), territorially, historically and partly culturally connected to Indian-administered Ladakh. The areas, often called Balwaristan by the local population, were at that time referred to also as 'Gilgit and Ladakh', between 1972 and 2009 known as the Northern Areas (NA), and after 2009 as GB. GB, for some time renamed non-specifically as the NA, a designation which deprived the territories of their history and identity, and AJK, having once been a part of one and the same PSJ&K and currently being administered by Pakistan, have experienced rather different fates. The division of the Pakistani-held territories of PSJ&K materialised through the first and most relevant (KA) of the two Karachi agreements, signed on 28 April 1949, the other being the Karachi Cease-Fire Agreement (KCFA) signed on 27 July 1949 defining the cease-fire line (CFL) of Jammu and Kashmir. Conspicuously, there was no signatory or representative of GB (NA) to the Karachi Agreement, nor did GB have any representatives in the Azad Kashmir government of those days. It is also for this reason that the legality of the Azad Kashmir representatives, viz. the provisional Azad Jammu and Kashmir Government and Muslim Conference, to cede total control over GB, which they did not control, to Pakistan is very doubtful. Not deriving their legitimacy and authority from any popular vote, their self-proclaimed government neither represented the population of GB nor of AJK, and their political powers had not been bequeathed to them in a legitimate manner from the then legal authorities of the State of Jammu and Kashmir, which made their authority over the territories altogether usurpatory. The weak legal empowerment of their self-styled rule was not sufficient to decide over the break-up of the territories and entrusting a large chunk of them to Pakistan's sole rule. The fateful agreement divided Pakistani-administered territories of PSJ&K into two sections. With it, the AJK government placed all affairs related to NA (GB) in the hands of Pakistan.[1] Section III of the Karachi Agreement (KA) regulated the '[d]ivision of functions between the Government of Pakistan, the Azad Kashmir Government and the Muslim Conference'.

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Further, 'A. Matters within the purview of Pakistan Government', which included eight points discussed earlier, with one most relevant for the future of GB: 'A(viii) All affairs of the Gilgit and Ladakh areas under the control of Political Agent at Gilgit', who was an administrator representing the Government of Pakistan.

Some of what has been observed in the foregoing sections also applies to GB. Constitutionally, as in the case of AJK, Pakistan for all practical reasons treats the areas of GB, placed under its direct and exclusive control, as its integral territory by following a similar pattern of establishing laws there and administering it, a crucial difference being that it has been done single-handedly, without any involvement of a corresponding 'Government of Gilgit and Baltistan' or 'Gilgit and Baltistan Legislative Assembly'. Despite having a similar history of being parts of one state, both have been treated differently by Pakistan. Whereas AJK may seem to be a semi-autonomous entity, GB has remained under absolute and direct rule from Islamabad. In 1949, the Government of Pakistan established the Ministry of Kashmir Affairs (MKA), thereafter renamed the Ministry of Kashmir Affairs and Northern Areas (MKANA), which unilaterally governed the NA, alongside Azad Kashmir, and treated them as a direct extension of Pakistani territories with their officers 'on deputation'. Until the actual transfer of the charge of the Gilgit Agency to MKA in 1950, it had remained under the same administration as the North-West Frontier Province and Chitral.[2]

Through clause (d) of Article 1(2) of the 1973 Pakistan Constitution, decreeing that 'the territories of Pakistan shall comprise' also 'such States and territories as are or may be included in Pakistan, whether by accession or otherwise', it is sometimes argued that GB is a part of Pakistan, on par with AJK, though similar doubt applies here.

As soon as Pakistan had taken control of the territories, the political and administrative affairs of GB were managed through the British-era Frontier Crimes Regulation (FCR) of 1901, extended to GB in 1947 and by the Ministry of States and Frontier Regions. This set of rules had originally been enacted by the British Raj to administer the semi-autonomous Pashtun-inhabited tribal areas in the Northwest of British India bordering with Afghanistan, later known as the Federally Administered Tribal Areas (FATA).[3] Nothing in any earlier laws and regulations allowed for the formation of any self-governing bodies which would represent the interests of the population of GB or of local authorities, which was in contravention of UN resolutions, including the UNCIP 1948 resolution ('the territory … will be administered by the local authorities'). On 23 June 1950, NA were separated from the North-West Frontier Province and their administration came under the Ministry of Kashmir Affairs (document No. D. 3739-B/50, 23.06.1950). The region was ruled by the Political Resident or, since 1967, the Resident aided by two Political Agents, one each for GB agencies, who also exercised legislative powers in NA in consultation with the federal government. It was in 1969, during the military rule of General Yahya

Khan, that a facade institution was first created as an advisory body to the Resident (Commissioner N.A.), or a representative of the Government of Pakistan: the 16-member Northern Areas Advisory Council (NAAC) had no powers to administer the territories or to make any decisions other than to formally sanction development schemes prepared by the federal government. The first elections to the Advisory Council, the first semi-representative body of NA, took place in 1970. The change of name to the Northern Areas Council, followed by renaming the Resident as Resident Commissioner and political agents as Deputy Commissioners and enlargement to 18 members in 1974 during the time of Zulfiqar Ali Bhutto brought no change in the facade role of the institution which was chaired by the Federal Minister for Kashmir Affairs and had no say in legislative or executive matters. The system created a mere semblance of a representative system and self-governance.

Unlike in AJK, the declaration of martial law on 5 July 1977 by General Zia ul-Haq had immediate consequences for NA which were automatically declared Martial Law 'Zone-E' (Zones A–D being the four provinces), as if it were a component part of Pakistan on the territory of which the constitution was suspended.

The indeterminateness of the legal status of NA (GB) combined with the legal deprivation felt by residents of NA, who while being citizens of Pakistan could not exercise their fundamental constitutional rights and were not given full participation in the Federation of Pakistan, created a number of practical problems for the population, which often found themselves in a legal void. This resulted in the famous writ petition 'Malik Muhammad Miskeen and 2 others—Petitioners versus Government of Pakistan through Secretary, Kashmir Affairs and Northern Affairs Division, Islamabad and 10 others—Respondents' (APLD 1993) filed in 1990 and decided by the High Court of Azad Jammu and Kashmir on 8 March 1993, presided by Chief Justice Majeed Malik.[4] Precisely two residents of NA filed a petition against the Pakistan and AJK governments. They demanded that the AJK government assume administrative control of NA and subsume the territories under its full authority. In a detailed and well-argued plea, the petitioners as 'aggrieved persons' pointed out that they 'alongwith other residents, have been continuously deprived of their basic rights and the right of representation in the Government', and also of 'legislative bodies, of basic human rights and civil liberties, establishment of Courts, including High Court and Supreme Court, in addition to their exclusion from the main stream of the State [p. 137];' Further, '[t]hey are therefore, deemed aggrieved persons as contemplated under subsection (2)(a) of section 44 of the Interim Constitution Act, 1974 [p. 137]'.[5]

In its very comprehensive and convincingly reasoned judgement, based on a solid, thorough review of historical material and documents, most of them cited *in extenso*, the High Court of Azad Jammu and Kashmir accepted the petition and justified their ruling as follows:

'203. … We, therefore, hold that no legitimate cause has been shown by the respondents Nos. 1 (the Pakistani government—P.B.) and 2 (the AJK government—P.B.) to keep the Northern Areas and their residents (State Subjects) detached from Azad Jammu and Kashmir, under separate and arbitrary administrative system and deprive them of fundamental rights.'
'204. We accordingly accept the petition and direct:—

(i)

(a) the Azad Government to immediately assume the administrative control of the Northern Areas and to annex it with the administration of Azad Jammu and Kashmir;
(b) the Government of Pakistan to provide an adequate assistance and facility to the Azad Government in attainment of the said objective.

(ii) the residents (State Subjects) of the Northern Areas shall enjoy the benefit of the fundamental rights conferred by the Act, 1974. They shall be provided representation in—

(i) the Government;
(ii) the Assembly;
(iii) the Council;
(iv) the Civil services; and
(v) other national institutions, in due course of law.

(iii) Azad Government shall take steps to establish administrative and judicial set-up in the Northern Areas within the framework of the Interim Constitution Act'.

The judgement was significant in many ways. First, in a most outspoken way and drawing logical conclusions from all the extant legislation, it determined the legal status of NA as a legitimate constituent part of AJK, rejected the validity of the Karachi Agreement (KA) and quashed an oft-voiced interpretation that NA is a part of the (currently non-existent) PSJ&K but not a part of AJK. Second, it was an expression of the will of the intellectual and professional elite of both NA and AJK as well as a legitimate voice of the Kashmiris independent of the executive, legislative, administrative, economic and military dominance of Islamabad, which had methodically brought the whole class of Kashmiri and Gilgit-Baltistani politicians to subjugation.

However, after the Government of Pakistan had appealed against the abovementioned judgment, it was set aside by the Supreme Court of Azad Jammu and Kashmir, as 'the highest court of appeal' (AJKIC, Sec. 42). The set-up of the Supreme Court of Azad Jammu and Kashmir, 'consist[ing] of a Chief Justice to be known as Chief Justice of Azad Jammu and Kashmir and two other Judges' (AJKIC, Sec. 42(3)) is most significant

in the evaluation of its final judgement. Its Chief Justice is 'appointed by the President on the advice of the Council' and the other two judges are appointed 'by the President on the advice of the Council' (AJKIC 42(4)). Thus, the Government of Pakistan has the final say in these appointments insofar as the chairman of Council is the Prime Minister of Pakistan, and one cannot expect judgements fully independent of the Pakistani executive in politically controversial or complex matters.

In the judgment (PLD 1995 SC (AJ&K) 1), the following reasons were provided by the Supreme Court: 'To summarise, in the light of what has been stated, the conclusion which we reach is that Northern Areas are a part of Jammu and Kashmir State, but are not a part of Azad Jammu and Kashmir as defined in the Interim Constitution Act, 1974. We have also reached the conclusion that the High Court of Azad Jammu and Kashmir did not possess the necessary jurisdiction to issue a writ against the Government of Pakistan for handing over the control of the Northern Areas to Azad Jammu and Kashmir'. The rejection of the previous ruling of the High Court of Azad Jammu and Kashmir was politically motivated rather than reasoned and substantive in its contents and was primarily based on the assumption that the AJK High Court simply 'did not possess the necessary jurisdiction' to issue any judgment concerning the Government of Pakistan and was not in a position to rule against it. The ruling of the High Court and its subsequent repudiation by the Supreme Court led to further legal developments and prompted the federal government to undertake unprecedented action.

During the second tenure of Prime Minister Benazir Bhutto, on 12 June 1994, the Government of Pakistan, Kashmir Affairs & Northern Affairs Division, issued the Northern Areas Council Legal Framework Order (NACLFO 1994). It was supplemented with the Northern Areas Rules of Business (NARoB) of the same year. Through the Legal Framework Order, which was supposed 'to provide for the Constitution of the Council of Northern Areas and to introduce the people of this area to democratic institution and to give them a sense of participation in their affairs', the Government of Pakistan single-handedly regulated the laws for GB, continuing earlier practices. The head of GB became the Chief Executive (Sec. 2(1) c) 3(1)) who was 'the Federal Minister for Kashmir Affairs, Northern Areas, State & Frontier Regions Division'. He was in charge of 'Provincial Government' (sic), which also included the Deputy Chief Executive and the Chief Secretary, Northern Areas. A total of three to five members of the Council were selected as Advisors to the Chief Executive, who had a final say in their appointment, and they enjoyed the status of provincial ministers. The Federal Minister of KANA was also to chair the Northern Areas Legislative Council (NALC), which replaced the Northern Areas Council. Its powers were rather negligible and were limited 'to any matter enumerated in Schedule II', but 'subject to such limitations as the Government of Pakistan may, from time to time, impose' (Sec. 17(1)). Even then, any bill passed by the Council had to seek the assent of the Chief Executive

(Sec. 17A). Schedule II listed but a handful of matters, politically trivial, such as public order (with a number of exclusions), preventive detention and prisons, land, land tenure, land revenue, agriculture, local institutions and village administration, cattle, water, cultural events at a local level, public health, burials, fisheries, gambling and local taxes. All matters not enumerated in Schedule II remained within the prerogatives of the Government of Pakistan (Sec. 17B), and the laws made by it would by default prevail over the laws made by the Council.

Unlike in the case of Azad Jammu and Kashmiri legislation, in the Legal Framework Order, we find no mention of 'state subject', instead a reference to 'a bona fide resident of the Northern Areas' with respect to Council members (Sec. 12(1)(a)) and to 'every citizen' (throughout the document) who, for instance, 'shall have the right to remain in, and, subject to any reasonable restriction imposed by law in the public interest, *enter and move freely throughout Pakistan and reside and settle in any part thereof* (italics—P.B.)' (Schedule II, Sec. 15). The italicised phrase indicates that the NA were not treated as an integral part of Pakistan, into which 'every citizen shall have the right to … enter … and to reside and settle…'. On the other hand, the document also referred to a '*provincial* government' whereby it was implicated that NA came to be treated as a semi-province of Pakistan. Interestingly, the document did not envisage any restrictions on Pakistani citizens moving to or settling in NA nor acquiring property therein.

The Legal Framework Order imposed a loyalty oath on the Chief Executive, all members of the Legislative Council, Deputy Chief Executive and the Speaker and Advisors of the Northern Areas Legislative Council to 'bear true faith and allegiance to Pakistan and [to] uphold the sovereignty and integrity of Pakistan' (Schedule I, Forms A–E). Its contents differed from parallel oaths required for AJK officials who have to vow to 'remain loyal to the country and the cause of accession of the State of Jammu and Kashmir to Pakistan'. While the Kashmir loyalty clause implies that the territories of the State of Jammu and Kashmir cannot be treated as integral parts of Kashmir until their status is settled, nothing of this kind is contained in NA loyalty oaths which speak of 'allegiance to Pakistan'. This move appears to take it for granted that these areas have been practically incorporated within Pakistan for all practical purposes. The legislation put NA in a loop somewhere between a province of Pakistan, albeit with federal central control unlike provinces, and a Pakistani dominion with undetermined status.

The aforementioned 1993 ruling of the High Court of Azad Jammu and Kashmir and the introduction of the Legal Framework Order in 1994 prompted another series of litigation from NA soon after, this time of quite a different character. In 1994, two constitution petitions (nos. 11 and 17) similar in contents, both of which concerned the legal status of NA, were filed by NA residents, Al-Jehad Trust (Rawalpindi) and nine other petitioners, against the Federation of Pakistan through the Secretary, Ministry of Kashmir Affairs in Islamabad (SCMR 1999/1379). In support of the first,

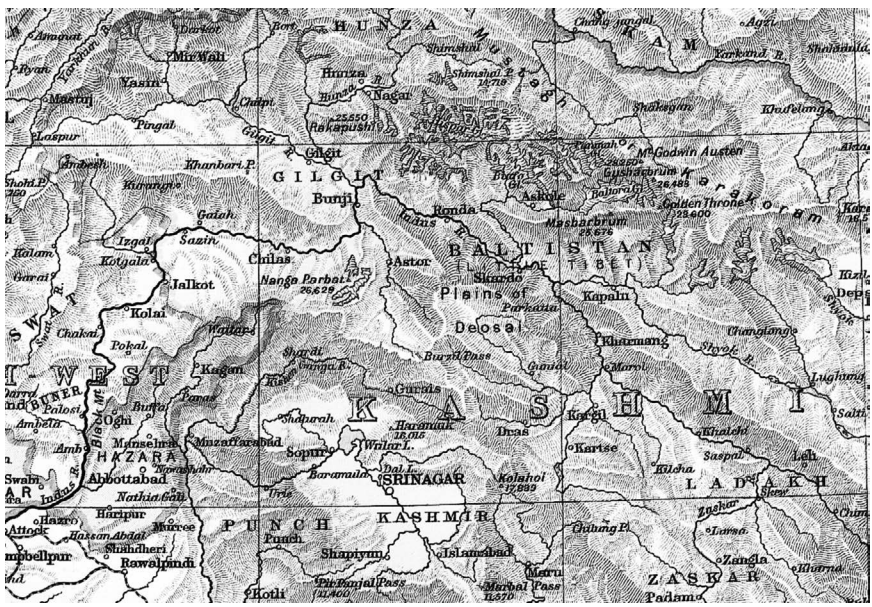
the Advocate of the Supreme Court Habibul Wahab Al-Khairi (founder of Al-Jehad Trust, one of the petitioners) explicitly argued—and his contentions were reiterated by the Advocate of the Supreme Court Sh. Muhammad Naeem (Constitution Petition No. 17)—'that the Northern Areas is part of the territory of Pakistan in terms of Article 1 of the late Constitutions of 1956 and 1962, Article 2 of late Interim Constitution of 1972 and Article 1 of the Constitution'.[6] The petitioners also demanded that 'the provincial government status be given',[7] *ergo* that also NA be granted the status of a province, which would entail the incorporation of the territories into Pakistan.

Both petitions were eventually decided 28 May 1999 by the Supreme Court of Pakistan (1999 SCMR 1379). In its judgement, the Supreme Court admitted that 'Pakistan exercises *de jure* administration in the Northern Areas', but even if one 'assum[ed], though not conced[ed]', that the claim of *de jure* administration is untenable, 'then the doctrine of *de facto* administration applies here. Even otherwise, under Public International Law, Pakistan has *exercised a continuous effective occupation of the Northern Areas* (italics—P.B.) for the past fifty years'.[8] In this way, the Supreme Court explicitly refrained from declaring the NA territories a constitutional part of the federation of Pakistan. At the same time, it emphasised that the actual question of either the inclusion of territories into Pakistan or resolving which territories are Pakistan's constitutional part does not lie within the jurisdiction of the court but is the prerogative of the Government of Pakistan: 'The executive authority of the State has in the exercise of its sovereign power the right to say as to which territory it has recognised as a part of its State and the Courts are bound to accept this position'.[9] The fact that the Supreme Court did not accept that NA were a part of Pakistan should be taken as its interpretation that the territories did not form a constitutional part of the federation and that the Government of Pakistan had so far not declared them to be as such. It merely conceded that Pakistan enjoyed *de jure* or *de facto* administrative control over NA, which were not necessarily its territories.

However, since the territories had been administered by Pakistan for half a century, whether *de jure* or *de facto*, and the international community, including the United Nations, generally recognised this fact,[10] it was the duty of Pakistan to provide the residents of the territories adequate administration, justice and basic rights, which the Government of Pakistan did not do: 'It is, therefore, patent that the people of Northern Areas have been denied their fundamental right to have access to justice through an independent judiciary as envisaged by the Constitution…'[11] In its ruling, the Supreme Court of Pakistan emphasised that since NA residents live in territories administered by Pakistan, they should also enjoy the same fundamental rights which are guaranteed to all Pakistani citizens by the 1973 Constitution. Accordingly, 'The people of the Northern Areas are entitled to an independent judiciary for the enforcement of these rights, as well as to limited participation in local governance. The Al-Jehad ruling also holds that Northern Areas citizens are

liable to pay taxes in Pakistan but, paradoxically, states that there is no legal obligation to grant them representation in the National Assembly'.[12] In the conclusion, the Supreme Court urged the Government of Pakistan 'to initiate appropriate administrative/legislative measures within a period of six months from today to make necessary amendments in the Constitution/relevant statute/statutes order/orders/rules/notification/notifications, to ensure that the people of Northern Areas enjoy their above fundamental rights, namely to be governed through their chosen representatives and to have access to justice through an independent judiciary inter alia for enforcement of their Fundamental Rights guaranteed under the Constitution'.[13]

Thus urged by the Supreme Court, the Government of Pakistan had to initiate appropriate 'legislative, executive and judicial reforms' the result of which was the Gilgit-Baltistan (Empowerment and Self-Governance) Order, 2009 (GBESGO 2009), 'granted to the people of Gilgit-Baltistan' by the Government of Pakistan on 9 September 2009. The new legislation, in many ways problematic,[14] changed the unspecific name 'the Northern Areas' to 'Gilgit-Baltistan' which was felt to reflect the regional identity of its residents and to go back to the historical name of the Gilgit Wazarat as a frontier district of the former State of Jammu and Kashmir as well as to the regional names of Gilgit and Balstistan (Balti, Tibetan: སྦལ་ཏི་སྟན་, *sBal Ti St'an*), or rather more commonly Baltiyul (Balti, Tibetan: སྦལ་ཏི་ཡུལ་, *sBal Ti Yul*, 'Little Tibet') (Map 6.1). There could nonetheless be another



Map 6.1 Gilgit, Baltistan, Ladakh and other regions, 1909. Fragment, source: IGI (1909: 141).

way to look at the renaming act. The change to GB would symbolically *dissociate* the territories from the historical PSJ&K in which such an administrative division had never existed.

Despite the unsubstantiated claim that 'the 2009 Order re-named the region and designated it a province',[15] the text clearly distinguishes it from provinces and only speaks of 'the Gilgit-Baltistan or any Province of Pakistan' (e.g. Art. 24; not 'any *other* province'). It does, however, use the expression 'the Provincial Government of Gilgit-Baltistan' (Third Schedule, 17), though on all other occasions, it consistently speaks of 'the Government of Gilgit-Baltistan', with no reference to 'province'.

The structure of Pakistani-dominated power in GB was now generally moulded on the pattern of AJK and envisages the same kind of 'personal union' with Pakistan. The head of state of GB, fully dependent on Pakistan, was the governor 'appointed by the President of Pakistan on the advice of the Prime Minister of Pakistan' (Art. 20(1)) to 'hold office during the pleasure of the President' of Pakistan (Art. 20(4)). This office could also be served by the Federal Minister for Kashmir Affairs and Gilgit Baltistan (Art. 20(a)). As in the case of AJK, the Order created a Pakistani-controlled two-tier bicameral structure of power. The first in the executive tier was the Government to 'exercise [the executive authority] in the name of the Governor' (Art. 22(1)) and was headed by the chief minister elected by the GB Legislative Assembly. The governor in whose name the government was the executive authority and who was himself appointed by the President of Pakistan, also 'appoint[ed government] ministers' (Art. 24). Its executive authority was limited in two ways (Art. 31). Firstly, it only 'extend[ed] to the matters with respect to which the [Legislative] Assembly ha[d] power to make laws', and in addition it had to comply 'with the laws made by the Council and Pakistan laws'. The second executive chamber was the GB Council the chairman of which was the prime minister of Pakistan (Artt. 2(d), 33). It consisted, in addition to the Pakistani President-appointed governor, who was at the same time the vice-chairman of the Council, of 'six members nominated by the Prime Minister of Pakistan from time to time from amongst federal ministers and members of [the] Parliament' of Pakistan and the federal minister of KANA (Artt. 33(1)–(4)), as well as by the chief minister of GB and six members elected by the Legislative Assembly. In this personal set-up of the Council, most members were either officers of Pakistan or appointed by the Pakistani president or prime minister, which bolstered the almost omnipotent dominance of Pakistan. The Council had both executive and legislative powers (Article 33(12)).

In the law-making tier, the prerogatives of the elected Legislative Assembly were likewise highly restricted (Art. 47(2)(b)) to politically trivial matters listed in the Fourth Schedule (Assembly Legislative List) which merely replicated Schedule II of NACLFO (1994). All important issues enumerated in the Third Schedule (Council Legislative List) remained within the prerogatives of the Council (Article 47(2)(a)), which also 'ha[d] the powers to adopt

any amendment in the existing Laws or any new Law in force in Pakistan' (Article 47(2)(c)). The Order also sanctioned a third legislative body, which was the Government of Pakistan entrusted with 'exclusive power to make laws in respect of any matter not enumerated in the Council Legislative List or the Assembly Legislative List' (Article 47(3)).

The only local representative body, the Assembly, was completely incapacitated not only through legislative restrictions but also through explicit censorship imposed on its sessions (Art. 44). This also testifies to the fact that the Government of Pakistan had learnt the 1993 lesson of the High Court Azad Jammu and Kashmir ruling (*vide supra*) and decided to silence court rulings which might be problematic to Pakistan: 'Restriction on discussion in Assembly, etc.: No discussion shall take place in the Assembly or the Council or the joint sitting with respect to matters relating to Foreign Affairs, Defence, Internal Security and Fiscal Plans of Government of Pakistan and the conduct of any Judge of the Gilgit-Baltistan Supreme Appellate Court or the Gilgit-Baltistan Chief Court in the discharge of his duties'.

All public servants occupying the highest positions were also required to take loyalty oaths formulated in GBESGO (2009), closely modelled on AJKIC (1974). The text of the oaths of the Governor, Chief Minister, Speaker and Deputy Speaker of Legislative Assembly contained the loyalty clause 'I will remain loyal to Pakistan', which is straightforward compared to the similar loyalty clause contained in AJKIC (1974) ('I will remain loyal to the *country*'), here 'country' replaced with 'Pakistan'. However, unlike AJKIC 1974, the oaths decreed by GBESGO 2009 do not contain the other, *crucial* part of the loyalty clause ('[I will remain loyal to] … the cause of accession of the State of Jammu and Kashmir to Pakistan'), i.e. something like 'I will remain loyal to … the cause of accession of Gilgit-Baltistan to Pakistan'. This may indirectly point to Pakistan's treatment of the GB territories as an integral part thereof.

However, Article 7 of the same Order intimates that GB could be treated as a territory separate from Pakistan, albeit administered by it: 'Freedom of movement. Subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right to move freely throughout the Gilgit-Baltistan and to reside and settle in any part thereof'. Freedom of movement here extends only to the region and there is no reference to free movement within Pakistan. If GB were treated as a genuine territory of Pakistan, Article 7 would explain freedom of movement as within Pakistani borders, not 'throughout the Gilgit-Baltistan'.

Unlike all legislation concerning AJK, the document, including Article 7, does not contain the phrase 'state subject', which is here consistently replaced with 'citizen', defined in Section 2(b) as 'a person who has a domicile of Gilgit-Baltistan'. This could be taken as a verbalisation of Pakistan's policy of legal discontinuity of GB with PSJ&K and of its actual separation from AJK being an important step towards the full annexation of the territories of GB as a fifth province of Pakistan. A similar linguistic device reflecting

the integration of Kashmiri territories with the union is instantiated in the case of IaJ&K, where the law only knows the concept of 'the permanent resident'.

As indicated earlier, the Pakistan Citizenship Act applies to the GB region in the same way as it does to AJK, meaning that the residents of GB are *here* treated as citizens of Pakistan despite the undetermined status of the territories. It is occasionally pointed out that the abovementioned definition of citizen of GB stands in contradiction with the 1973 Constitution of Pakistan and Article 260 ('"citizen" means a citizen of Pakistan as defined by law') and that 'the definition of citizenship is different in both legal documents. The Gilgit-Baltistan Empowerment and Self-Governance Order has separate definition of citizens hence the GBians (sic!) cannot be considered the citizens of Pakistan according to the constitution of Pakistan and GB empowerment and self-Governance order 2009'.[16] However, the juxtaposition of both definitions does not seem to yield a contradiction inasmuch as Section 2(b) of GBESGO (2009) refers specifically to 'a person who has a domicile of Gilgit-Baltistan', which does not have to, and cannot, imply any formal *state* citizenship of GB, inasmuch as the region is not an independent political entity in terms of international relations and law but merely connotes 'having residency in Gilgit-Baltistan', and entails certain particular rights which such a citizen may enjoy, or alternatively be deprived of (e.g. may not participate in federal elections or have his or her representation in federal institutions). At the same time, it maintains the vague status of GB, not explicitly considered a constitutional part of Pakistan. On the other hand, Article 260 of the Constitution of Pakistan carries quite different implications, which also concern international law, and defines who may be regarded a citizen of Pakistan vis-à-vis other states (e.g. having a travelling document issued by Pakistan) and what particular rights such a person may enjoy. In other words, both definitions refer to different political-historical contexts and use the term 'citizen' in two different senses, which carry different implications, since with certainty, both were tailored to divergent legal requirements. That notwithstanding, the result is a clear violation the right to political participation, including the right to vote and to be elected and to have equal access to public services in a resident's country. As Israr-ud-din Israr, the provincial co-ordinator of the Human Rights Commission of Pakistan for GB succinctly phrased it: 'I hold a Pakistani ID card, but I cannot vote for people in parliament. I cannot become prime minister or a member of parliament. I do not fit the description of a citizen, according to the constitution'.[17] He found himself among 50 GB activists who had been 'charged with sedition for calling for greater self-rule' in the region in the period between October 2014 and local elections in 8 June 2015.

Following the pattern of Pakistan's total control of electoral processes in AJK through a chief election commissioner endowed with full supervisory powers, GBESGO (2009) also envisages a similar position of the chief election commissioner who is 'appointed by the Chairman of the Council', i.e.

by the prime minister of Pakistan, 'on the advice of Governor' who is, in turn, appointed by the president of Pakistan (Art. 82).

As has been observed earlier with respect to AJK, namely 'the reincarnation of the Princely System', is also starkly palpable in GB.[18] As is frequently pointed out, '[o]wing to KANA's role in the Northern Areas, all instruments of internal security are controlled by non-locals',[19] and the local people perceive the presence of Pakistani bureaucrats as 'an alien administration'.[20]

The establishment of GB's own judiciary, including the GB Supreme Appellate Court (Artt. 60–65), the chief judge of which is 'appointed by the Chairman of the Council (the Pakistani prime minister—P.B.) on the advice of the Governor and other Judges shall be appointed by the Chairman on the advice of Governor (appointed by the Pakistani president—P.B.)' (Art. 60(5)), or the GB Chief Court (Artt. 69–76) through GBESGO (2009) not only eased the access to legal protection and justice for the average resident but also opened new routes of articulation for local problems and desiderata also in the political sphere. As a result of the changes to the legal system, it was widely debated when the Supreme Appellate Court of GB declared, in exercise of its *suo motu* jurisdiction, that GB was a part of Pakistan (2010 GBLR 160). In the justification of its ruling, the Court referred to Article 1 ('the Republic and its territories') of the 1973 Constitution of Pakistan and sub-Section 1(2)(d) that states that '(2) [t]he territories of Pakistan shall comprise' … '(d) such states and territories as are or may be included in Pakistan, whether by accession of otherwise'. The Court further asserted 'that as such, the Gilgit-Baltistan (Empowerment and Self-Governance) Order, 2009, had constitutional protection and status in as much as the same was enacted in pursuance of Article 258 of the Constitution of Pakistan (see above—P.B.)… In a nutshell, the Supreme Appellate Court, via the use of various constitutional provisions, has attempted to elevate the status of the area, and its laws, to that of a constitutional constituent of the Federation of Pakistan'.[21]

The inapplicability of Section 1(2)(d) in its current form and international context, to GB and AJK, both being in the same way historical parts of the former PSJ&K and requiring the same legal treatment, has been discussed above, as has the complexity of Article 258 of the 1973 Constitution of Pakistan, which merely grants special powers to the president of Pakistan to administer certain territories. Assuming, but not conceding, that Article 258 does apply to GB—and such application is less problematic than in the case of AJK mentioned in Article 257, which holds the status of AJK as undetermined, while there is no corresponding article with respect to GB—it does not suffice to infer that these territories enjoy the status of a constitutional part of Pakistan but merely that their administration through President's orders is possible only under UNSC and UNCIP resolutions. Nevertheless, the judgment of the Supreme Appellate Court was highly significant in political terms as an expression of the political will of at least some residents of GB who felt most uneasy with the state of a legal void concerning their region.

As the judgment reveals, there has been a much stronger controversy surrounding the status of GB and its incorporation into Pakistan compared to the debate about the status of AJK. Some groups claim that GB has effectively been accepted by the institutions of Pakistan as its territory, one of the foremost proponents of such opinion being Justice Syed Manzoor Hussain Gilani (2009), the Pakistani-appointed judge of the Supreme Court of Azad Jammu and Kashmir in Muzaffarabad, who argued soon after the introduction of GBESGO 2009, though not quite faithfully to the letter of the legislation: 'The Supreme Court of Pakistan has already held in relation to Northern Area that these areas are part of Pakistan and government of Pakistan should take steps to give them fundamental rights which was accordingly done. This authority applies equally to AJK as it is of similar status under UN resolutions and constitution of Pakistan. The above and much more political and administrative indulgence both in AJK and GB leaves no doubt that both are practically treated as parts of Pakistan territory as defined in Art 1(2)(d) of the Constitution of Pakistan, short of being its province or part of federation and there is no ambiguity about it'. This view can be often heard among a number of Pakistani-associated lawyers and can, for instance, be found in *A Report on Judicial Independence and Integrity in Pakistan*, which treats GB as a constitutional part of Pakistan but grants an undetermined status to AJK.[22]

Much earlier, in April 1982, General Zia ul-Haq was reported to have declared that 'Gilgit, Skardu and Hunza were not disputed areas, but part of Pakistan'.[23] During his visit to Quetta on 9 May 1982, he further stated: 'Kashmir has been a disputed issue, but so far as the Northern Areas are concerned, we do not accept them disputed'. On yet another occasion, the inauguration of the second session of the Shura, General Zia addressed the representatives from NA invited to the session with the words: 'I am talking about the Northern Areas, which make part of Pakistan'. However, in an interview with Indian journalist M.J. Akbar, the Editor of *Weekly Sunday*, he contradicted his own words saying that 'Gilgit Baltistan were not part of Pakistan and were as much disputed as the rest of the Kashmir'.[24] It seems that the views metamorphosed depending on the addressee of the political message and political requirements.

Some groups extend the idea of the inclusion of GB to all territories of PSJ&K and argue that '[b]oth Azad Jammu and Kashmir and Gilgit-Baltistan are "*territories otherwise included*" in Pakistan under UNCIP Resolutions. Purportedly, this position was accepted by India through the Cease-Fire Agreement of 1949, the Tashkent Agreement of 1966 and the Simla Agreement of 1972'.[25] The reading of the aforementioned documents does not warrant such a conclusion that India ever accepted, even implicitly, the inclusion of these territories within Pakistan. On the contrary, India has always consistently maintained that GB is a part of the Kashmir territories and belongs to the successor of PSJ&K. For instance, the second Karachi Agreement (KCFA, Sec. B.1) establishes the CFL, which is later

replaced, through the Simla Agreement (SA 1972), with the Line of Control (LoC), and its geographical course, the positions of military troops and all other details meticulously described (Sec. B.2, C–K). There is no reference to the status of the territories or their administration. Similarly, we find nothing in the Tashkent Declaration (TD 1996) to the same end. Further, a close reading of the Simla Agreement does not allow for the interpretation that the territories of AJK and GB were implicitly accepted by India to be 'territories otherwise included' in Pakistan. The relevant passages of the Agreement proclaim that 'the Government of India and the Government of Pakistan have agreed' 'that the pre-requisite for reconciliation, good neighbourliness and durable peace between them is a commitment by both the countries to peaceful co-existence, *respect for each other's territorial integrity and sovereignty* (italics—P.B.) and non-interference in each other's internal affairs, on the basis of equality and mutual benefit', 'that they shall always *respect each other's national unity, territorial integrity* (italics—P.B.), political independence and sovereign equality', and 'that in accordance with the UN Charter they will *refrain from the threat or use of force against the territorial integrity or political independence* (italics—P.B.) of each other'. The general reference to the territorial integrity, sovereignty or political independence of India and Pakistan does not imply that AJK and GB were treated as component units of Pakistan in any way. The only direct reference to Jammu and Kashmir is Clause 4. stating that '[i]n Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognised position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations. Both sides further undertake to refrain from the threat or the use of force in violation of this Line', not *Border*. Its reading does not provide any grounds for assuming that the status of the territories has in any way been determined by the Agreement.

In stark contrast to the aforementioned opinions stands what Sardar Abid Hussain Abid, AJK Minister for Information, articulated in a public speech delivered on 27 February 2016: 'Constitutionally and legally, the territory of Gilgit-Baltistan is part of the State of Jammu and Kashmir and any attempt to secede it from the disputed region will deal a blow to the stand of Pakistan and Kashmiris regarding the longstanding dispute'.[26] This opinion is probably privately shared by the majority of Azad Kashmir politicians and jurists, though not necessarily manifested in public debate for fear of various kinds of reprisals and the loss benefits accruing from dependence on the federal government.

Opinions are also not infrequently voiced in Pakistan that GB is not a constitutional territory or part of Pakistan in any way. For instance, in January 2015, Asma Jahangir said that 'neither the 21st Amendment nor Article 1 of the Constitution defined these areas (GB—P.B.) as being part of Pakistan'.[27]

Supporters of the claims that GB is or should be incorporated into Pakistan[28] and that a factual split of the Pakistani-administered territories of PSJ&K had already taken place before Pakistan assumed the control of the territories may theoretically look for some justification in the fact that the separation materialised on 26 March 1935 when the Gilgit Agency was entrusted by Maharaja Hari Singh to the British for a lease period of 12 years to be returned to the Maharaja after the expiry of the lease,[29] i.e. in March 1947, whereas the actual retrocession of the Gilgit Agency to the Maharaja's control took place only when the Partition plan of the British Raj was announced on 3 June 1947.[30] In consequence of the lapse of the lease treaty, the Jammu and Kashmir State government appointed Brigadier Ghansara Singh as its own governor of the territories on 17 July 1947 through Political Order[31], which stated that 'His Highness the Maharaja Bahadur has been pleased to command that—(1) The administration of the entire Gilgit territory i.e. Gilgit Wazarat north of the Indus and all Political Districts be taken over on 1st August. (2) The above together with Bunji will form the Gilgit Frontier Province…' However, the fact that prior to that date, 'although Gilgit formed part of the State of Jammu and Kashmir, it was administered by the British Government of India through a political agent',[32] is not a sufficient grounds to claim that Pakistan acquired rights to the territories, because both during the *lease* of the Gilgit Agency, the territories still formed an integral part of the State of Jammu and Kashmir and at the moment of the actual Partition, these were again governed by the Maharaja's administration. It is true that 'by January, 1949, Pakistan undeniably held military control over the Northern Areas' and 'the area was administered by local Authorities, not of Jammu and Kashmir Government, with the assistance of Pakistan officials',[33] but the period could rather be considered occupation of the territories as a result of military activities which assisted an uprising.

Any speculation about GB being possibly incorporated into Pakistan makes alarm bells ring among some political leaders in AJK who have regularly expressed their concern over alleged moves to convert GB into the fifth province. That sometimes happens at the highest political levels. For instance, on 7 July 2015, Azad Jammu and Kashmir President Sardar Mohammad Yaqoob Khan warned the prime minister of Pakistan that any steps to convert GB into the fifth province of Pakistan would be more damaging than the dismemberment of the country in 1971 and urged him 'to avoid [taking] any decision that does not fall in his jurisdiction. He cannot take this decision unless we, the people of Jammu and Kashmir, take it'.[34] The call was reiterated on the following day by Azad Jammu and Kashmir Prime Minister Chaudhry Abdul Majeed who emphasised that 'Gilgit-Baltistan is part and parcel of the state of Jammu and Kashmir. Any attempt to merge it into Pakistan will deal a fatal blow to our stand in the light of UN resolutions envisaging right to self-determination for the Kashmiris'.[35] He also recalled that GB 'had been given in the administrative control of Pakistan on a temporary basis'.

The legal ambiguity regarding the status of the region, deliberately sustained by the authorities, has lingered over the decades and finds its subtle symbolic expression in three parallel *official* independence days. The first commemorates the collapse of the Dogra rule and thereby underscores the distinct Kashmiri integrity and is celebrated by some residents, including the Gilgit-Baltistan Democratic Alliance, a grouping of pro-independence nationalists, as what they call the real Independence Day of GB. The second is the all-Pakistan Independence Day which seeks to instil Pakistani identity and the third is the Independence Day of GB, which is supposed to assert a unique local self-identification and semi-separate political status. The declaration of the third of them in 2007 by the local administration to commemorate 'the martyrs and heroes of 1947 war' was met with widespread criticism. In reaction, Manzoor Hussain Parwana, Chairman of Gilgit-Baltistan United Movement, said: 'We have been celebrating two independence days for 60 years, firstly on 1st November, which is historically our independence day from Dugras (sic), secondly on 14th August at the occasion of Independence Day of Pakistan officially. Now 21st November will be our 3rd independence day'.[36]

There is nothing particular that would warrant the legal separation of GB from AJK except for an arbitrary will of the Government of Pakistan, which has administered all these territories since 1947 under UNSC and UNCIP resolutions. It is quite a different question, which merits a separate treatment outside the scope of this work, why Pakistan is interested in preserving GB as an entity politically and administratively separate from AJK (*vide infra*). Suffice to say that we find various explanations for it, such as the following: 'Federal Government of Pakistan assumed the charge of these areas from the "AJK" government on the pretext that Muzaffarabad was unable to govern it directly for its lack of financial resources and communication network. Secondly, at the same time the leadership of AJK presumed that the freedom was around the corner and after that the whole state would join Pakistan through plebiscite held under the UNSC resolutions. In this context, the leadership of AJK regarded the transfer of control to Pakistan as a temporary arrangement'.[37] This can be contrasted with the opinion expressed by the Azad Jammu and Kashmir High Court that 'it has been the consistent view of this Court that the Azad Government represents the whole State of Jammu and Kashmir. The liberated territories of the State, since 1947, and such other territories which were not under the effective control of the Indian Government, were deemed under the effective administrative control of the Azad Government. Therefore, the Azad Government, for all practical purposes, was considered as enjoying de facto control over such territories. The aforesaid view is fully approved, as a useful assistance to set at rest the controversy in question'.[38] In other words, and such a conclusion seems to be accurate, the separation of GB is not only artificial but also in legal terms illegal and historically unwarranted. An opinion one often hears in the region also points to the sectarian, religious background: 'Many locals

believe sectarian bias is behind the decision to maintain widely different political arrangements to the Northern Areas and AJK. Unlike AJK, which, like Pakistan, has an overwhelming Sunnī majority, the Northern Areas are the only Shīʿa-majority region under Pakistani control'.[39]

Notes

1. The text of the Karachi Agreement in APLD (1993: 121–125). See also ICG (2007: 5), Alam–Bali (2012: 20).
2. Dani (1991: 414).
3. Where they are still in force. It is only now that the Federal cabinet has approved the recommendations of the FATA Reforms Committee to introduce 'a set of parallel and concurrent political, administrative, judicial and security reforms' to FATA and to repeal The Frontier Crimes Regulation (FCR), which should be replaced with the new Riwaj (customary laws P.B.) Regulation for Tribal Areas, see Khan (2016, 2017).
4. Cf. PHRP (1994): 'In 1993 the High Court of Azad Jammu and Kashmir (AJK) ruled that the Northern Areas should be incorporated into the semi-autonomous state of Azad Jammu and Kashmir and its inhabitants given a right to be represented in the AJK legislative assembly. In August the High Court ruled that the Federal Government has authority over the Northern Areas until final status of Jammu and Kashmir is resolved'. See also Sökefeld (2016: 179–180).
5. APLD (1993: 9)
6. SCMR (1999/1379: 1389).
7. SCMR (1999/1379: 1385).
8. SCMR (1999/1379: 1391).
9. SCMR (1999/1379: 1390).
10. SCMR (1999/1379: 1391).
11. SCMR (1999/1379: 1399).
12. ELP (2004: 17).
13. SCMR (1999/1379: 1401).
14. See e.g. Singh (2013: 21–22).
15. Hong (2012: 1, 6).
16. E.g. Israr (2015a).
17. AJN (2015-07-20)
18. Cf. Behera (2006: 177–194).
19. Behera (2006: 179).
20. Behera (2006: 179).
21. IN (2011), GBB (2011).
22. Mullally (2009: 19): 'In addition to the Provinces, Pakistan also consists of Federally Administered Tribal Areas, Provincially Administered Tribal Areas, the Federally Administered Northern Area, and the Islamabad Capital Territory. Also, the western part of the former princely state of Kashmir (Azad Jammu) is de facto controlled and administered by Pakistan, but the final status of Kashmir has not been determined'.
23. *Daily Nawai Waqt*, Rawalpindi, 13 April 1982, cited in Rahman–Mahmud (2004: 128–129), Mahapatra–Shekhawat (2008: 105).
24. Rahman–Mahmud (2004: 128–129), Mahapatra–Shekhawat (2008: 105).
25. PILDAT (2011a: 9).
26. Tariq Naqash (2016-01-10).
27. *Dawn* (2015-01-15).

28. Cf. APLD (1993: 1385–1388).
29. See e.g. Schofield (2003: 19), Alam–Bali (2012: 50).
30. Schofield (2003: 62).
31. Chief Secretariat—Political Order No. B. 480/47-P.B., 17th July, 1947; see: APLD (1993: 55).
32. APLD (1993: 1385).
33. APLD (1993: 1388).
34. Tariq Naqash (2015-07-09).
35. Tariq Naqash (2015-07-09).
36. GBUM (2007-12-13).
37. Alam–Bali (2012: 32).
38. APLD (1993: 112).
39. ICG (2007: 1).

7 New legal tremors in Gilgit-Baltistan

Piotr Balcerowicz

The biennium of 2018 and 2019 unfolded new important circumstances of legal nature that well illustrate Pakistani political centre's disdain for the people of Pakistani-administered Jammu and Kashmir (PaJK) and their rights, and the consistent principle of making the laws for GB (and Azad Jammu and Kashmir [AJK]) above the heads of the people concerned. As noted before, on 28 May 1999, the Supreme Court of Pakistan urged the Government of Pakistan to introduce adequate laws 'to ensure that the people of Northern Areas [now GB—P.B.] enjoy their … fundamental rights'.[1] The order materialised a decade later in the shape of GBESGO (2009).

Still a decade later, on 26 May 2018, the President of Pakistan Mamnoon Hussain approved the Government of Gilgit-Baltistan Order (GGBO 2018), which repealed (GBESGO 2009). The draft had been submitted to prime minister Shahid Khaqan Abbasi on 3 January 2018 by a nine-member constitutional committee headed by Sartaj Aziz, the then advisor to the prime minister on foreign affairs, and the final order incorporated some but not all of the recommendations of the committee. On his very first day in office, on 1 June 2018, the caretaker prime minister of Pakistan and former Supreme Court Chief Justice, Nasirul Mulk, enacted it with a corresponding notification through the Ministry of Kashmir Affairs and Gilgit-Baltistan (MoKGB). Some critical voices pointed to the unconstitutionality of the procedure through which it was the prime minister who had made the notification, and thus he had exceeded his executive powers by assuming the role of the legislature, instead of a presidential order.[2] The argument does, however, not apply to this particular case because the Constitution of Pakistan formally extends only to the territories specified in Article 1 of the Constitution as the territories of Pakistan, *ergo* not to GB directly. The legal link between Pakistan and GB, with its still undefined legal status, is through MoKGB, under the supervision of the Pakistani prime minister.

Following the standard procedure, the process of drafting the new law took place with no prior consultations with, and hardly any knowledge of the people of GB. The document was advertised by government circles as accommodating the demands of some sections of the GB population to integrate the region with Pakistan and extend to it the same legal status as to the

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constitutional provinces of Pakistan, and this intention was expressed in the preamble: 'to bring Gilgit-Baltistan at par with other provinces'. However, this was clearly not the case, for in major points, the document retained the provisions of GBESGO (2009) and introduced merely cosmetic changes, in some cases regressive and detrimental to the interests of the people of GB. Unsurprisingly, the order was rejected by much of the GB population, who felt being left out of the discussions on the law and, as reported, 'there were protests in the territory against what was described as a retrogressive replacement of the Gilgit-Baltistan (Empowerment and Self-Government) Order of 2009'.[3] Some critics of the new law also 'argued that it appears to extend GB citizenship rights to all Pakistani citizens, further encouraging settlement'.[4] This was indeed the case, because even though all relevant clauses of GGBO (2018, Artt. 24, 25) that regulated the relation between citizens and property (including immovable property) were taken *verbatim* from the earlier (GBESGO 2009, Artt. 15, 16), the crucial change occurred in the very definition of who the 'citizen' is (*vide infra* for the analysis of GBGR 2019, Art. 2(b)). Soon after, the GB government, exercising their executive authority in the name of the GB governor, appointed by the Pakistani president on the advice of the Pakistani prime minister, duly implemented the controversial order. However, the new law in exactly this form proved very short-lived. Since GGBO (2018) as such never materialised, I will defer from analysing its contents in deep.

Amidst popular protests and demands of full democratic rights and representation, with the participation of various civil society groups, pro-independence associations and mainstream politicians,[5] on 20 July 2018, the Gilgit-Baltistan Supreme Appellate Court ruled that 'the implementation process of the Government of Gilgit-Baltistan Order, 2018 is hereby suspended till the decision of this petition.[6] Consequently, the Gilgit-Baltistan (Empowerment and Self-government) Order, 2009 shall field till then'.[7] In addition, the bench pointed out the self-contradictory nature of some provisions of the law (§ 2). This final decision was taken on 13 July, and Supreme Appellate Court upheld its earlier ruling: GBESGO (2009) remained in force.

In consequence, the case reached the Supreme Court of Pakistan, Islamabad, which overruled the verdict of the GB court and thereby reinstated (GGBO 2018), although in a form slightly modified by the court itself (and published in a form annexed to the court judgement), now entitled the Gilgit-Baltistan Governance Reforms, 2019 (GBGR 2019), on 17 January 2019. In its ruling (SCP 2019-01-17), the court referred to its earlier judgement of 1999, namely that people of GB 'are citizens of Pakistan, for all intents and purposes… are also entitled to participate in the governance of their area and to have an independent judiciary to enforce, *inter alia*, the fundamental rights' (SCMR 1999/1379, p. 1393). One may concur with the judgement that the president and the prime minister of Pakistan and the MoKGB were not *ultra vires* when it comes to the legality of the procedures

to introduce GGBO (2018) as well as its legitimacy within the legal framework applicable to Pakistan and Pakistani-administered territories, provided one accepts the legality of the previous GBESGO (2009). It was fully within the powers of the Government of Pakistan to introduce the new laws (GGBO 2018, GBGR 2019) 'by notified Order', as specified in Article 93 of GBESGO (2009), inasmuch as, in terms of their contents and phrasing, the new laws should rather be treated as amendments to GBESGO (2009) (*vide infra*). What remains debatable is, first, whether and to what extent Pakistan may single-handedly exercise its powers with respect to all Kashmiri territories (including GB) it administers without due involvement of the people of these lands, and second, whether the changes which the new laws (GGBO 2018, GBGR 2019) brought could be regarded as any improvement of civil rights of the people and serving their empowerment in a better matter. The ruling of the Supreme Court met with wide calls upon the president of Pakistan to defer the controversial law till the requirement of genuine consultations with the people of GB is met. The Government of Gilgit-Baltistan Order (GGBO 2018) was forthwith enforced by MoKGB.

In no way is the order in the new version (GBGR 2019) a radical departure from the earlier GBESGO (2009), and it can be treated rather as an amendment of the former. The modifications are primarily of twofold character: they expand the catalogue of certain ideas and values and disambiguate a number of clauses. The novelties, as compared to the earlier law (GBESGO 2009), include the addition of the clauses: 'the elimination of all forms of exploitation' (Art. 3), 'equal protection of law' and equal treatment 'in accordance with law' as 'inalienable right[s] of every citizen' (Art. 4), as well as the extension of fundamental rights with the following: the 'right to fair trial' (Art. 9), 'inviolability of dignity of man', which includes the provision that 'no person shall be subjected to torture for the purpose of extracting evidence'[8] (Art. 13), 'right to information' (Art. 19), 'right to education' (Art. 26) and 'preservation of language, script and culture' (Art. 29). All of these additions are clearly steps in the right direction. Some of these addenda are a natural result of international human rights conventions which Pakistan had accessed after 2009 and before 2018. The prohibition of torture, before non-existent in Pakistani law, is an implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CTOCIDTP; *passim*) and the International Covenant on Civil and Political Rights (ICCPR; Art. 7), both accessed to by Pakistan in 2010. Similarly, the right to information was necessitated by the ICCPR (19.2), and it first materialised in Pakistan in the legal form of a 2010 constitutional amendment (CIRP 1973, Art. 19A) and the ensuing Right of Access to Information Act of 2017 (RAIA 2017).

An important addition of GBGR (2019) is a whole part defining 'principles of policy' (Artt. 30–40) that specify certain general guidelines to be followed by government organs and authorities in administrating GB. These include a number of *desiderata*, such as 'Islamic way of life' to be protected

by the state and 'compulsory' teaching of Islam as a state duty (Art. 32), protection of family and minorities (Artt. 36, 37), 'promotion of social justice and eradication of social evils' (Art. 38) as well as 'social and economic well-being of the people' (Art. 39). In addition, the new order allows for the service of GB citizens in Armed Forces (Art. 40).

There are no essential changes as regards the office and powers of the governor and the government to be noted, except for minor aspects. For instance, the chief minister is given one more explicitly stated duty, namely to 'keep the governor informed' (Artt. 45, 51), which as if inadvertently emphasises the actual role of the chief minister who merely acts as an executive extension arm of the governor as the head (which has to be informed…). Part VI: Gilgit-Baltistan Council and Part VII: The Legislature (Legislative Assembly etc.) are almost identical in wording with Parts V and VI, respectively, of GBESGO (2009), except for minor changes or additions, such as the exclusion of dual nationals from the GB Legislative Assembly (similar to Pakistan's Parliament). Full control of government and legislation remains with Islamabad, inasmuch as the head of GB is, as before, the 'governor of the Gilgit-Baltistan [who] is appointed by the president on the advice of the prime minister' (Art. 41), and all 'executive authority of Gilgit-Baltistan shall be exercised in the name of the governor' (Art. 43); it is exclusively the governor who indicates the time and place for the meetings of the Legislative Assembly (Art. 61) and may dissolve it at any time (Art. 62). Distribution of legislative powers (Part VIII) remains practically intact, and only minor cosmetic modifications concern the judicature (Part XII), with basic structure retained. The new law specifies Urdu as the official language of GB, whereas English may temporarily be used for official purposes (Art. 120). In addition, all military organisations ('private armies') are forbidden and the defence and external security are exclusively the prerogatives of the Pakistani government (Artt. 121, 68 (3)(a)). In addition, the contents of all oaths of office are identical.

One may have an impression that, for all practical purposes, these new laws (GGBO 2018, GBGR 2019) hardly changed anything. They brought no change in the structure of government and the so-called legislature and in legal safeguards extended to Islamabad to exercise full control over the territory, with no involvement of the local population. There is, however, a radical change encapsulated in an insertion of the words 'or resident' to the original definition: '"citizen" … means a person who has a domicile of Gilgit-Baltistan' (GBESGO 2009, Art. 2(b)). As a result, the new laws read, '"citizen" means a person who has a domicile *or* [is a] *resident* of Gilgit-Baltistan' (GGBO 2018, GBGR 2019, Art. 2(b)), which is extremely significant. From 2019, in the view of the new regulations, the citizens of GB are defined not only as persons who have their domicile in the territories, viz. who belong to GB as genuinely permanent citizens for generations, traditionally known as state subjects (see: SSDN), but also those who merely *reside* in GB temporarily, even for a short period, and who do not belong to the territories at all,

i.e. outsiders. This seemingly insignificant change in the definition should be read with all occurrences of the term in the document. For instance, the provision that 'every citizen shall have the right to acquire, hold and dispose of property' (GBGR 2019, Art. 23 = GGBO 2018, Art. 24), which was there in place also earlier (GBESGO 2009, Art. 15), acquires a completely new meaning. Property is defined in all three laws as 'any right, title or interest in property, movable or immovable, and any means and instruments of production',[9] and this includes land. The new reading has grave consequences for the whole region, inasmuch as it opens the legal gateways to citizens of all Pakistan to move into the region, buy land, construct their enterprises there etc., the result of which may be a gradual process of demographic dilution of the indigenous population, which contravenes the international law. At the end of the process, the legitimate residents of GB may share the fate of the now minorities of Uighurs, Tibetans and Mongols in their native lands remaining within the borders of China or of Palestinians in the occupied territories. The new order legitimises the unofficial practice which has been clandestinely followed there over past decades.

The implications of the new reading of 'the citizen' extend to other provisions, also to those of critical political significance. Any citizen, including an outsider from Pakistan temporarily residing in GB, may be a member of local political parties (Art. 16(3)), be employed in government institutions, pursue his or her profession and have business (Art. 17), use the benefits of the local system of education (Art. 22(3)), participate in local governance and legislature, for instance become advocate general (Art. 53) and a member of the Gilgit-Baltistan Legislative Assembly (Art. 58). At the same time, the practice of 'Gilgit-Baltistan open to all' is not reciprocated by the Pakistani side, for true citizens of GB cannot enjoy the same political and civil rights in Pakistan, of which they are *not* genuine citizens but are only treated as such *for all practical purposes*, i.e. 'for all intents and purposes' (SCMR 1999/1379, p. 1393) in particular cases. In this respect, the relation between Pakistan and GB is not symmetrical. In practice, say, a Punjabi has now acquired all rights to move to GB as a full-fledged citizen there, purchase land and immovable property there and become an officer of the government or a member of the Legislative Assembly, whereas the state subjects of GB do not enjoy parallel rights in Pakistan and are excluded from participating in any Pakistan's elections. GBGR (2019) legitimises a colonial practice of unequal and asymmetrical treatment of the population of the periphery remaining under the absolute control of the centre, and their lands open to unrestrained settlement, acquisition and exploitation by the outsiders.

Theoretically, a possible explanation for such discrimination could be an intention of the nine-member constitutional committee, which drafted GGBO (2018) that 'GB be accorded a "provisional" and special status of a Province pending final settlement of the Jammu and Kashmir dispute' (p. 19), a view shared by the Supreme Court (SCP 2019-01-17). As a result, GBGR (2019)

opens with a preamble that declares, 'the Federal Government intends to give Gilgit-Baltistan the status of a provisional Province, subject to the decision of the Plebiscite to be conducted under the UN Resolutions'. In the same ruling (SCP 2019-01-17), the Supreme Court asseverated that 'these reforms [GBGR 2019—P.B.] are by definition provisional until the time when the people of Kashmir exercise their right of self-determination under the plebiscite' (§ 23, p. 22), and that 'the present status of Gilgit-Baltistan [is that of] a region that is fully within the administrative control of Pakistan, and where Pakistan functionally exercises all aspects of sovereignty' (§ 24, p. 23). Accordingly, civil and political rights of genuine citizens of GB (as now distinguished from 'paper citizens' of GB in the light of the new definition of 'citizen' in GBGR 2019) have to remain provisionally restricted inasmuch as GB cannot be accorded a status a full-fledged province of Pakistan as long as the status of the territory remains indeterminate, pending the plebiscite. Such rationale to explain discriminatory and unequal treatment of genuine citizens of GB would be deficient because, following the same logic, the territories of GB should be accorded similar provisional protections from demographic changes as well as provisional self-governance and autonomy, in contrast to absolute powers exercised exclusively by the outsiders.

GBGR (2019) should, as it appears, be treated as one more step in Pakistan's policy of *faits accomplis* with respect to GB and AJK with the intent to gradually incorporate them into its constitutional territories, once the Kashmiri dispute can no longer be exploited in the political game against India and utilised as a justification of internal policies of Pakistani Establishment and an explanation of the special position and extraordinary powers enjoyed by the Deep State of Pakistan.

A possible accession of GB to (or rather its incorporation into) Pakistan would primarily be a political decision and would require clear political will. It is formally possible through an act of the Parliament of Pakistan *and* a constitutional amendment and formally requires the consent of all the provinces, which, given the political ramifications and central power of the army and agencies behind the facade of civilian governments in Pakistan, can be taken for granted. Even though it would not be in sync with the international law, such a decision could override historical agreements and easily find an expression in formal asseverations of GB authorities' will to access Pakistan, inasmuch as the region remains in a kind of 'personal union' with the Federation of Pakistan through the persons of the prime minister of Pakistan (the chairman of the Gilgit-Baltistan Council) and the president of Pakistan (who appoints the Governor): whatever is decided in Islamabad is implemented on the ground.

One could argue that the final incorporation of the GB territories would clearly be an imposition of the political will of Pakistan, conjoined with a disregard for the genuine political aspirations of the population of PaJK and their political rights, but not so essentially different from previous decisions and actions of the Pakistani government with respect to the territories,

such as the unilateral introduction, with no consultations, of such laws as AJKGA (1964), AJKGA (1968), AJKGA (1970), AJKIC (1974) etc. for AJK, and NACLFO (1994), GBESGO (2009), GGBO (2018), GBGR (2019) etc. for GB. However, the essential difference would be that whereas the introduction of President's orders, constitutions, acts and other regulations—all rescindable and amendable at any point of time expedient to Pakistan—to the legal systems of GB and AJK would (albeit vaguely) remain within the prerogatives delineated by the ramifications of UNCIP and UNSC resolutions as interpreted by the Government of Pakistan to grant it the right to administer the territories, without predetermining their status, their actual incorporation would clearly *determine* that status and would involve a breach of the principles of international law. In addition, it would most likely be met with the tacit acceptance of India, which seems interested in transforming the current LoC into the international border but places the blame on the other side. This caveat found its expression, for instance, in prime minister Yusuf Raza Gilani's statements made before and during his visit to GB in November 2009, that GB could not be granted a proper constitutional status in view of Pakistan's commitment to and obligations under the resolutions of UNCIP and UNSC, which assert that the final status of Jammu and Kashmir is yet to be determined through a plebiscite held under UN auspices.[10] This position has been reiterated by a number of other Pakistani authorities, e.g. by the attorney general's statement, on behalf of the president of Pakistan and the federal government, that GBESGO (2009) was issued for the region of GB because it had no representation in parliament due to its disputed status.[11]

The question remains whether such an incorporation of the territories would therefore be at all in the interest of Pakistan or of the establishment which has ruled the country for decades. A formal accession of GB to Pakistan would certainly be interpreted as Pakistan's acknowledgement of Jammu and Kashmir's accession to India and the latter's full rights to the territories under its current administration. In addition, it would mark Pakistan's acceptance of the current partition of the territories between India and Pakistan as a permanent solution of the territorial status of PSJ&K. Most importantly, the 'popular', agencies-steered mobilisation in Pakistan in support of the 'Kashmiri cause' has been an important factor in Pakistani politics and in the justification of the Establishment's, the army's and the intelligence's domination of politics, both internally and externally, and of the economy and resources. As is well known, the 'Kashmiri cause' and the 'threat of India' provide an excellent justification for their ascendency and unhampered grip on all political matters, finances and privileges, and it may seem unlikely that they would relinquish the rhetoric, alongside with the power it brings.

However, one of the other reasons that so far prevented Pakistan from incorporating GB (and AJK) into its constitutional territories is no longer there. It was precisely a fear that such a move would trigger a similar process

of the final disintegration of the remnants of PSJ&K that are administered by India as J&K. On 5 August 2019, India precipitated the process of the dissolution of the region itself, which therefore may soon lead to the formation of the Gilgit-Baltistan Province, required by Pakistan as its integral part in order to have a permanent and irreversible strategic land link to China. With this move, however, Pakistani Establishment, including the military and the intelligence, would lose (a part of) the trump card in the form of PaJK as a chunk of the whole territory of the former PSJ&K (with India occupying the other chunk), the future of which 'is yet to be determined'—a powerful argument that has, first, always served to portray India as an existential threat to Pakistan and, second, as a rationale for the dominant role of the military and the intelligence in Pakistan. However, even with the incorporation of GB, the other part of the trump card would still be on the table in the form of AJK.

At the same time, the idea of the incorporation of GB into Pakistan faces opposition across LoC among Kashmiri activists and separatists. This dubious constitutional character of GB is highlighted, for instance, in opinions expressed across the LoC by J&K politicians, such as Syed Ali Shah Geelani, who reacted to a proposal made on 14 January 2014 by the Pakistani federal MoKGB and Sartaj Aziz, the National Security Advisor of Pakistan, to the effect that the regions of AJK and GB be made the fifth and sixth provinces of Pakistan, respectively.[12] Geelani strongly opposed the proposal and emphasised that the Pakistani government should not take any steps that could change the disputed nature of Kashmir: 'When we talk of Kashmir dispute it includes all the five regions. It was not wise on part of Pakistan to take any step that can challenge the resolutions passed in the UN which is the base of our struggle for right to self-determination'.[13]

There is no doubt that maintaining the separation of the two chunks of PaJK creates serious tensions between the populations of GB and of AJK at various levels, including the governments of both regions, the judiciary, political leaders and intellectuals. The separation is not only 'mental', but also geographical, with transport and communication routes not extended, constructed or maintained after 1947. The transport infrastructure of roads which are built and repaired, and also seasonal paths, serves to connect both regions directly only to Rawalpindi-Islamabad, but not to interconnect them. No project has ever been conceived, let alone completed, similar to the Lowari Tunnel[14] devised to connect Chitral and Dir in the Khyber Pakhtunkhwa province under all-weather conditions and to provide all-year-round access to the Chitral Valley, regularly cut off from the rest of the world from late November to late May due to snow cover. This infrastructural neglect and lack of political will even to develop theoretical plans to interconnect both regions at some point in the future can be better understood through the prism of the actual intentions of Islamabad to deepen their disunion.

As a result, two different kinds of nationalism are being constructed and nurtured with their distinct identities and regional-historical narratives. The cleavage seems to serve Pakistan's policy of gradually incorporating GB by means of soft power, thus bringing no serious repercussions vis-à-vis its policies towards Indian-administered Jammu and Kashmir (IaJK), and leaving AJK in a state of pseudo-autonomy as a bargaining chip in its diplomatic engagements with India. In addition, the policy is hoped to give a free hand to the government, the army and the agencies of Pakistan in their economic contacts with China and Chinese investments, including the China-Pakistan Economic Corridor (CPEC) which passes through the territories. The Chinese government and Chinese companies expect that the territories of GB, where they plan to allocate their funds, will have a determined status, so far recognised by both sides in the 1963 Boundary Agreement between China and Pakistan (BAChP; see Chapter 12) as disputed territories remaining 'under the actual control of Pakistan'. The CPEC project raises protests on the Indian side which emphasises that the Corridor 'passes through parts of the Indian state of Jammu & Kashmir which has been in illegal occupation of Pakistan since 1947' and the Indian government 'asked [China] to cease these activities' 'in Pakistan Occupied Kashmir'.[15]

The current indeterminateness therefore increasingly tilts sympathies in the region towards Islamabad. The population, including nationalists—being fully dependent on Pakistan's policies and gradually more and more dissociated culturally, administratively, politically and transport-wise from AJK, and from the idea or myth, of the State of Jammu and Kashmir in general—tend to opt for the inclusion of their region within Pakistan as a constitutional territory. As a result, the actual materialisation of such a plan will be announced by the Pakistani government as a response to the genuine demands of local residents who decide to be a part of the Pakistani project. Furthermore, in the rather unlikely case of a referendum, they would most likely vote for the accession of their territories to Pakistan.

In all the Pakistani-administered territories, be they treated as structurally independent of or included within AJK, the residents of GB cannot exercise their basic political rights, such as the right to vote in federal elections or exercise their right to control their finances (budget) through their elected representatives. By the same token, it is irrelevant whether these territories enjoy the status of a true province of Pakistan, being constitutional territories of it, or preserve their status 'yet to be determined in accordance with the freely expressed will of the people of the State'; Pakistan has a legal obligation to provide for their basic political rights *both* under Pakistani and international law. Similarly to AJK, the population of the region does not have any seats in the Parliament of Pakistan and is thereby kept from any influence on the policies concerning their economic, social and political development. Moreover, the population of both territories is excluded from

constitutional institutions that coordinate relations between the capital of the Pakistani federation and its units and are meant to assist in resolving potential disputes, such as the Council of Common Interests (CIRP 1973, Artt. 153–154) or the National Economic Council (CIRP 1973, Art. 156) and the National Finance Commission (CIRP 1973, Art. 160). Of particular interest to the territories of PSJ&K under Pakistani administration, which are an extremely important source of natural resources, including water reservoirs and hydro-plants (e.g. the Mangla Dam), would be the Council of Common Interests. It is responsible for solving disputes encompassing 'complaints as to interference with water supplies' (Art. 155) that arise 'if the interests … in water from any natural source of supply or reservoir have been or are likely to be affected' in a number of ways by actions of the federal government, executive acts, legislation, failures of any authority etc. and similarly in the case of electricity (Art. 157), natural gas and hydroelectric power (Art. 161).

The National Economic Council and the National Finance Commission are two crucial administrative bodies in the Pakistani federation regarding the economy and the regulation of relations between the political centre and constituent units. The former 'review[s] the overall economic condition of the country and … formulate[s] plans in respect of financial, commercial, social and economic policies, … ensure[s] balanced development and regional equity', whereas the latter is in charge of recommending to the president of Pakistan policies regarding taxation and revenues, distribution of funding (esp. of the proceeds of taxation) to Pakistan's component units etc. Having no representation in these bodies eliminates the population of PaJK from any policymaking process and puts them in a disadvantageous position in case of any dispute: 'although Azad Jammu and Kashmir and are stakeholders in all matters falling within the ambit of these bodies and are affected by their decisions and policies, they have no say in their decisions'.[16] Despite being the major source of water in Pakistan, 'Azad Jammu and Kashmir and Gilgit-Baltistan are also not represented on the Indus River System Authority (IRSA) and unlike provinces, they get no share in the profits earned from the hydroelectric power stations located in their territories'.[17] This gives rise to a paradoxical situation where, on the one hand, natural resources of the territories are exploited by Pakistan as their own, but on the other, the population of the territories is denied their basic rights, such as the participation in decision-making and exercising their responsibilities with respect to the resources or acquiring benefits from their use, as a consequence of not being represented in any important decision-making bodies and not being treated as citizens of Pakistan. In this sense, one might gain the impression that these territories find themselves under the occupation of a foreign power.

Certain important differences notwithstanding, we may conclude that the legal systems of both GB and AJK under Pakistan's administration present clear cases of a serious and unwarranted limitation of human

rights (ICCPR, Art. 5), especially civil and political rights, such as the right to self-determination (ICCPR, Art. 1), the right to freedom of thought and conscience and the right to hold opinions without interference, including political views (ICCPR Artt. 18, 19), being infringed by restrictions on discussion in public offices (e.g. GBESGO 2009, Art. 44; respective press and political parties' regulations in AJK), and on public discourse, the right to peaceful assembly and freedom of association (ICCPR, Artt. 21, 22), the right to political participation, including the right to vote and to be elected, take part in the conduct of public affairs, and to have access, in general terms of equality, to public services in a citizen's country (ICCPR, Art. 25) (see: Balcerowicz–Kuszewska, 2022b).

The so far still undetermined (partly due to Pakistan's political will) legal status of the Pakistani-administered territories cannot serve as an explanation or excuse for the situation, because Pakistan, treated either as a legitimate administrator under UN resolutions or (according to some views) as an occupying force, has corresponding legal obligations to regulate the affairs of the territories in such a way that, respectively, *either* they 'will be administered by the local authorities' (UNCIP 1948), and Pakistan's role is that of assistance, *or* to administer them under applicable international humanitarian laws (e.g. IV GC, Artt. 2, 64), under which basic rights cannot be derogated from (ICCPR, Art. 2.1), and people's 'right of self-determination' is acknowledged (IV GC-P1, Art. 1.4), and in such a way that 'the transitory character of the rights and duties incumbent upon the foreign administrator precludes making definitive large-scale changes in the institutional structure of the occupied territory'.[18] Under these logical two alternatives, Pakistan's single-handed administration of and drafting laws for the territories without the active involvement of the population, as has been carried out so far, would logically imply Pakistan's acknowledgement of the occupation status of the territories it administers, a conclusion Pakistan would certainly loathe to accept.

As it was to be expected, the unanticipated revocation of the autonomous status of IaJK by the Indian government in August 2019 forced Pakistani Establishment to seriously consider taking steps in a similar direction. Within a year, with the blessing of the military and the services, Prime Minister Imran Khan's government and Pakistan Tehreek-e-Insaf (PTI) gradually forged a compromise with various opposition parties 'to grant provisional provincial status' to Gilgit-Baltistan, which would prompt a radical change in the GB's constitutional status.[19] In the run-up to the elections to the GB Legislative Assembly held on 15 and 22 November 2020, in which local parties were practically sidelined, PTI of Pakistan's Prime Minister Imran Khan consistently played the 'provisional province' card to garner the voters' support. The policy paid off: PTI secured the absolute majority with 22 seats, with contesting PPP 5 seats and PML-N 3 seats. In the midst of the campaign, on the occasion of the (first, see above) GB Independence Day on 1 November 2020, Prime Minister Imran Khan

visited Gilgit where he officially declared that the Pakistani government had 'decided to grant Gilgit-Baltistan the provisional provincial status', noting that 'this decision ha[d] been taken while keeping in view the UN Security Council (UNSC) resolutions'.[20] Soon after the election results were announced, Imran Khan constituted a 12-member committee as a first palpable step in the direction of granting GB the status of a provisional province of Pakistan. The committee was headed by Ali Amin Gandapur, the Federal Minister for Kashmir Affairs and Gilgit-Baltistan, and comprised mostly Pakistani politicians, having no link to GB, namely 'the attorney general of Pakistan, federal secretaries for finance, defence, foreign affairs, parliamentary affairs, GB chief secretary, joint secretary of the GB Council and representatives of security agencies'. The task of the committee was to make relevant recommendations by 1 March 2021, on the basis of which a bill would be tabled in the National Assembly to amend the Pakistani constitution and 'to declare GB as constitutional part of Pakistan'.[21] Once the bill is passed, the mission that began in 1947 will be accomplished: GB—despite the label 'provisional status'—will become incorporated into Pakistan as its constitutional territory through CIRP (1973, Art. 1(2)(d)), and the provision will practically be speaking of permanent character, with little chance to revoke this constitutional change in the future. At the same time, the prolonged process of the dismemberment of Jammu and Kashmir and the severing of GB from the rest of PaJK will be completed. The two chunks administered by Pakistan will from now on enjoy very different legal status.

In a parallel development, steps were taken to seal off the break-up of PaJK into two completely disconnected (in terms of constitutional status, administration and transportation routes) chunks of GK and AJK. In the midst of the elections in the neighbouring GB, Raja Farooq Haider Khan, the current Prime Minister of AJK, launched 'Save Kashmir' campaign on 11 November 2020. He rather ambiguously emphasised that 'the state of Jammu and Kashmir was an indivisible entity' which one might understand, on the one hand, as a defence of the unity of all territories of the former Princely State of Jammu and Kashmir (PSJ&K), that is also of the inseparability of GB from AJK. Such a reading of his words that might supposedly have expressed his resentment against the plans of Pakistan to incorporate GB as its constitutional territory would be supported by the fact that he also 'publicly questioned what authority the government of Pakistan had to divide Kashmir'. On the other hand, another reading was implied in his rather equivocal speech, namely that the 'Save Kashmir' campaign would primarily concern the indivisibility of AJK from Indian-administered territories, with GB left aside, thus being much in line with the official stance of Pakistani military, intelligence and government. While 'demand[ing] that the upcoming elections in Gilgit-Baltistan should be free and fair', and 'promising that AJK's polls scheduled for next year (2021—P.B.) would also be free and fair',[22]

he uttered no word that both election processes, in fact, concerned one the same indivisible historical unit that should remain undivided, or that any attempt to grant GB a status of a constitutional province of Pakistan would be in violation of the integrity of Jammu and Kashmir. Speaking of the elections in GB and AJK as two independent processes, he seemed to unwillingly acknowledge the separability of the territories. Such interpretation was immediately taken up by Chief of the Army Staff General Qamar Javed Bajwa, who swiftly shifted the onus to the territorial dispute with India and the dissolution of IaJK's autonomy in 2019. In a meeting between Raja Farooq Haider and Javed Bajwa, 'matters of mutual interest particularly situation on LOC & IIOJ&K (Indian Illegally Occupied Jammu and Kashmir—P.B.) [were] discussed' as well as 'the Pakistan Army's utmost support and commitment to Kashmir cause and the people of Kashmir', with no mention of the status of GB.[23] Precisely this line of interpretation, emphasising the integrity of AJK and IaJK, with no reference to the fate of GB, was later also voiced by Prime Minister Imran Khan, who pledged the Kashmiris gathered in Kotli (AJK) that 'when you decide on your future, and when the people of Kashmir … decide in Pakistan's favour, … after that Pakistan will give Kashmiris the right that if you want to be independent or a part of Pakistan … this will be your right'.[24] These developments indicate that, despite the conflict of words between India and Pakistan, both countries proceed the same path of changing the *status quo* into a permanent solution, with IaJK and PaJK being ultimately incorporated in the two countries.

Notes

1. SCMR (1999/1379: 1401).
2. Justice (R) Muzaffar Ali (2018).
3. HRCP (2018: 168).
4. FH AJK (2019).
5. OHCHR (2019: § 148).
6. The petition was filed in February 2018, when the petitioner learned of the plans and of the contents of three drafts of the new order under preparation from 'a letter of Principal Secretary to the Prime Minister of Pakistan dated 21.02.2018'.
7. GBSAP (2018); see also PT (2018-06-21).
8. Striking is rather an awkward formulation which may suggest that torture for other purposes is permissible.
9. GBGR (2019, Art. 2(o)) = GGBO (2018, Art. 2(m)) = GBESGO (2009, Art. 2(m)).
10. See also Alam–Bali (2012: 77).
11. GBB (2012).
12. Kathju (2015).
13. Israr (2015a).
14. The project, conceived in 1956, with the first works undertaken in 1975, resumed in 2005 for short periods, has so far proved to be a failure.
15. MEA (2017-12-20), see also, e.g. MEA (2017-08-10).

16. PILDAT (2011a: 9).
17. PILDAT (2011a: 9).
18. ICRC (2012: 10).
19. Wasim (2020).
20. *Dawn* (2020-11-01), IT (2020-11-01).
21. *Dawn* (2020-12-30).
22. Tariq Naqash (2020-11-11, 2020-11-12).
23. *24News* (2020-11-12).
24. Hashim (2021).

8 Pakistan vis-à-vis Chitral

Piotr Balcerowicz

In the debates on the Pakistani-administered territories of Princely State of Jammu and Kashmir (PSJ&K), the focus is primarily on AJK, from the mainstream perspective of Pakistani politicians (erroneously), treated as a legal successor of the former State and only secondarily on GB. However, most discussions ignore one more chunk of PSJ&K, which is under the control and administration of Pakistan, namely, Chitral, currently a part of the Malakand Division within Pakistan, on par with Swat and Dir.

Under constant pressure from the Amir of Afghanistan, Aman ul-Mulk, Mehtar (ruler) of Chitral acknowledged the suzerainty of the Maharaja of Jammu and Kashmir, Ranbir Singh, and indirectly of the British Crown, as a part of the Gilgit Agency through the Kashmir-Chitral Treaty of 1878 (draft prepared in 1877). The Treaty made Chitral formally a part of the State of Jammu and Kashmir, and the Mehtar of Chitral acknowledged Dogra suzerainty.[1] Under the treaty, the Maharaja also had two agents installed in Chitral. The accession of Chitral to the Gilgit Agency should be viewed in the context of the Great Game, and it was a measure meant to counter Russian expansion in Central Asia. The treaty was never abrogated and formally remained in force until 1947. For this reason, 'some people—mainly post-1947 Indian politicians, such as Jawaharlal Nehru—suggested that Chitral was part of the disputed territory that comprises J&K'.[2]

However, the administrative division of PSJ&K at no time reflected such a state of affairs, and Chitral was never seriously considered a province of the State or a territory effectively incorporated into it. Furthermore, the Maharaja's administration never properly extended to cover Chitral, except for the temporary presence of his two agents in Chitral and Yasin. Neither were any Kashmiri troops ever stationed there nor any economic links, such as taxes levied in the name of the Maharaja in Chitral, in existence at any time, except for the symbolic tribute—in the form of 'three horses, five hawks, five Tazi dogs (hounds)'—annually paid by the Mehtar to the Maharaja as an acknowledgement of the latter's suzerainty in exchange for an annual subsidy of 12,000 rupees of Srinagar coinage. Chitral was also almost non-existent in the laws of Pakistan in general or those concerning Kashmir. The 1956 and 1962 constitutions of Pakistan do not even refer

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to it by name. Only the 1973 constitution mentions Chitral as one of its territories (Art. 246 under 'Tribal Areas' and 'Provincially Administered Tribal Areas'). There is therefore hardly any historical or legal basis to include Chitral and its legal status in the context of the debate on the status of PSJ&K territories, although Chitral was a territory formally affiliated to PSJ&K for some time.

Notes

1. Chohan (1998: 57–59), Schofield (2003: 11), Alam–Bali (2012: 6–7).
2. Snedden (2015: 110–111).

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Part II

The legal status of Indian-administered Jammu and Kashmir

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9 India vis-à-vis Jammu and Kashmir

Piotr Balcerowicz

The matter is seen in a completely different light from an Indian perspective. India's stance on the status of the former Princely State of Jammu and Kashmir (PSJ&K) has evolved over the decades from a flexible approach in which India considered, at least declaratively, the accession of PSJ&K as provisional and temporary, until it reached a stage where India claims 'that ever since accession took place in October 1947 … Kashmir is not disputed territory, that CFL/LoC is located in *Indian* territory, and that the problem in Kashmir is simply of Pakistani aggression against a neighboring country'.[1] The development culminated in the dissolution of Kashmiri autonomy and the ultimate incorporation of Indian-administered Jammu and Kashmir (IaJK) territories as two separate union territories (UTJ&K and UTL). However, the picture is not as straightforward as many pro-Indian analysts would like to portray it, and India's position vis-à-vis Kashmir has not always been presented in a consistent, homogenous manner.

The question of the legal status of the PSJ&K territories remaining within India has been frequently discussed in various publications and, in addition, a number of dependable monographs have been published on the subject.[2]

The foundational document which has determined the fate IaJK and its relations with India is known as the Instrument of Accession of the State of Jammu and Kashmir (IoAJ&K); it indirectly impacted the future of PaJK. The Maharaja of the Dogras, Hari Singh, is said to have eventually signed it on 26 October 1947 (or reportedly even a day earlier), forced either by circumstances (the invasion of the Pashtun tribesmen and Pakistan nationals into the Western parts of PSJ&K combined with the rebellion in the Poonch, which posed a serious threat to his powers) or by the actual presence of Indian troops in Jammu, which presented the Maharaja with a *fait accompli*, or under pressure from V.P. Menon, the envoy from India and Sardar Vallabhbhai Patel's aide in the States Ministry.[3] The Instrument of Accession, accompanied by another letter dated 26 October 1947,[4] was accepted and countersigned on 27 October 1947 by Louis Mountbatten, the Governor General of India, and immediately put into action: reportedly, on the same day, a Sikh battalion was flown into Srinagar, where Hari Singh shifted to for safety reasons the day before.[5] Mountbatten's letter of the

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acceptance of Jammu and Kashmir's accession to India, an integral part of the accession process in legal terms, accepted all the provisions and limitations implied by the Instrument: 'Consistently with their (Dominion of India—P.B.) policy that in the case of any State where the issue of accession has been the subject of dispute, *the question of accession should be decided in accordance with the wishes of the people of the State*, it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invader *the question of the State's accession should be settled by a reference to the people* (italics—P.B.)'.[6] Consistent with this declaration, Jawaharlal Nehru reacted in the same tone in a public broadcast of 2 November 1947: 'We are prepared when peace and law and order have been established *to have a referendum held under international auspices* (italics—P.B.) like the United Nations. We want it to be a fair and just reference to the people, and we shall accept their verdict. I can imagine no fairer and juster offer'.[7] These asseverations were followed by respective UN Security Council resolutions.[8]

The validity and legality of the document has occasionally been questioned, for instance by Lamb (1994: 81–103), who also doubted whether the letter had ever been signed. Similarly, Hari Singh's freedom of choice has also been disputed in view of the fact that the Indian troops had allegedly already been stationed in Srinagar and the Maharaja signed the Instrument under the pressure of their presence. Even if these doubts could ever be positively validated, in the political reality, they actually have never played an important role, except for a historian who is interested in unravelling the historical truth and the sequence of facts. Political reality has definitely sealed the chapter: the legality of IoAJ&K as such, irrespective of its factuality or obscure circumstances under which it had been executed, was eventually confirmed and given temporary status until the issue of actual accession to India and the final determination of its status be resolved. Furthermore, neither the Maharaja himself nor the establishment seriously questioned the fact that IoAJ&K had been executed by the ruler of Kashmir.

With its accession, J&K came to enjoy a special status within the Indian union since, as A.G. Noorani (2011: 4) observes, '[e]xcept of Jammu and Kashmir, every state accepted Part B of the Constitution of India which contained provisions uniformly for the governance of the former princely states. Jammu and Kashmir was the only state to declare its intention to have its own Constitution drafted by its own Constituent Assembly. That was as far back as 5 March 1948, by the Maharaja's Proclamation, which is why it negotiated the terms of Article 370 to protect those rights'.[9] The accession of J&K to India was only provisional, conditional and restricted to the four (not *three*, as it is usually portrayed) essentials—viz. defence, foreign affairs, communications *and* ancillary—as defined in 'List I: Federal Legislative List' (FLL-GIA 1935), albeit with some additional limitations.[10] These were clearly stated in the Schedule of IoAJ&K, and the wording corresponded to the Federal Legislative List. In this way, most prerogatives

normally granted by the Federal Legislative List through GIA (1935) and the Instrument of Accession (a part of GIA 1935, Sec. 6) to the Federal Legislature were excluded in the case of J&K, and Maharaja Hari Singh reserved for himself special powers in the document. Through Clause 5 of IoAJ&K, the four categories of matters specified in the Schedule were not liable to any future change or amendment, unless accepted by the ruler. This condition was subsequently retained in Article 370 of the Constitution of India. Clauses 7 and 8 provided for guarantees of the Maharaja's sovereignty and his powers and ensured that Kashmir would have its own laws fully independent of any future Indian constitution. These can be interpreted as measures which were to reassure PSJ&K that it retained its autonomous status and provide for an opt-out alternative from the Union.

As against the opinion of some analysts,[11] the provisional and conditional character of the accession was well understood in the wording of IoAJ&K (esp. Clauses 7 and 8) by all parties concerned. It should be remembered that the accession of PSJ&K to the Union of India was not a merger, i.e. a complete territorial, legal and political integration. A legal principle sometimes applied in international law is that a union of states does not have to be irreversible, unless the accession conditions of such a union clearly stipulate that it is a complete merger and any such withdrawal of one state from the union is impossible. A good example for such reversibility is the United Arab Republic between 1958 and 1961 comprising Syria and Egypt, which continued to officially retain the name until 1971. Other instantiations of legal secessions are provided by the former Soviet Republics, all of which first declared their sovereignty within the Soviet Union (between 1990 and 1991), and thereafter full independence—all in keeping with the provisions of the USSR Constitution. The three Baltic republics, Lithuania, Estonia and Latvia, declared the restoration of their independence well before the dissolution of the Union of Soviet Socialist Republics (USSR) on 26 December 1991. A recent case is the exit of South Sudan from Sudan (formally a federal republic) on 9 July 2011 and the new state cannot be classified as a dominion gaining independence from a colonial power.

Clause 3 of the Indian Independence Act, 1947, stipulates that '[n]othing in this section shall prevent any area being at any time included in or *excluded* from either of the new Dominions', i.e. India and Pakistan, provided 'the consent of the Dominion' has been obtained. This is in some ways comparable to Article 50 of the Treaty on European Union (Article 49A of the Treaty of Lisbon), which is the legal basis for Brexit, or the United Kingdom's withdrawal from the European Union, the latest example of the reversibility of the accession to a union. The possibility of the conditional and provisional accession of a state was already foreseen in the Government of India Act (GIA 1935), as adapted on 15 August 1947 by the India (Provisional Constitution) Order dated 14 August 1947. The document specifies that 'each of the new Dominions and all Provinces and other parts thereof shall be governed *as nearly as may be* in accordance with the provisions of the

Government of India Act, 1935, and that the provisions of the Act shall, so far as applicable and *subject to any express provisions of the said Act and with such omissions, additions, adaptations and modifications* (italics—P.B.) as may be specified in orders of the Governor-General …'. In other words, the Act explicitly allows for various additional provisions, modifications, adaptations, etc. at the moment of accession.

That the accession of PSJ&K was not treated as permanent and irreversible in the beginning by both the Maharaja, Jawaharlal Nehru and Sardar Patel, and is well illustrated by a letter written by the disillusioned Hari Singh to Patel on 31 January 1948 intimating that he 'should withdraw the accession […]. The Union only provisionally accepted the accession and if the Union cannot recover back the territory […] then there is no point in sticking to the accession of the State to the Indian Union',[12] an option which he himself considered still on the table. In reaction, both Nehru and Patel dissuaded him from withdrawing the accession, the latter in a short reply 'assur[ing] you that I am no less anxious about the Kashmir situation and what is happening in the UNO, but whatever the present situation may be, a counsel of despair is entirely out of place',[13] with no mention of the irreversibility of the accession.[14]

The Constitution of India, adopted by the Constituent Assembly on 26 November 1949, contains the oft-discussed Article 370 (Article 306A in the draft),[15] which crucially regulates relations between J&K and India and forms the constitutional basis for the former's autonomy.[16] Purposively included in 'Part XXI.—Temporary and Transitional Provisions',[17] it reads,[18]

> 370. (1) Notwithstanding anything in this Constitution—
>
> a the provisions of article 238 (repealed by the Seventh Amendment Act, 1956—P.B.) shall not apply in relation to the State of Jammu and Kashmir;
> b the power of Parliament to make laws for the said State shall be limited to—
>
> i those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and
> ii such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.
>
> Explanation.—For the purposes of this article, the Government of the State means the person for the time being recognised by the President *on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat* (now: Governor) *of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office*[19];

c the provisions of Article 1 and of this article shall apply in relation to that State;

d such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

Article 370 provides only *interim* provisions for J&K and grants it special autonomy, which is 'temporary and transitional'. In general terms, it mandates that the Indian legislature is authorised to make laws for the state with respect to matters falling outside those specified in IoAJ&K if, and only if, the President of India obtained the 'concurrence' of the state government that permits the Parliament of India to legislate on such matters, provided the concurrence was approved by the Constituent Assembly. Out of a number of salient features of Article 370,[20] some are most relevant here. Through Section (1), it exempts J&K as the only Indian State from the standard provisions of the Indian Constitution (Art. 238), which are otherwise applicable to all states—except for those areas as specified in the Schedule of Instrument of Accession: 'the matters with respect to which the Dominion Legislature may make laws for this State', i.e. 'A. Defence …. B. External Affairs, …, C. Communications …'—and allows J&K the right to have its own constitution. The powers granted to the Parliament of India were restricted to these three essentials, which were 'to correspond to matters specified in the Instrument of Accession'. Importantly, other constitutional provisions and Union powers which did not fall into the areas covered by the IoAJ&K could be extended to J&K only with the 'concurrence of the government'

(currently the Governor) of J&K. This was however provisional, inasmuch as any extension of powers or a change of status had to be ratified by the Jammu and Kashmir Constituent Assembly (Art. 370(2)), which ceased to exist six decades ago.

The special status granted to J&K under Article 370 was from the outset considered provisional and could be abrogated, amended or modified by the President of India who was empowered to do so under Article 370(3), *provided* he received the recommendation of the (now non-existent) Constituent Assembly of the State. This, at least in theory, means that the provisional special status of J&K should remain in a sense permanent, and the Indian Parliament or President can exercise their powers, which they enjoy under Article 368, to abrogate or amend laws of all other states, except for J&K. This is where their legislative or executive powers end. It should be remembered that Article 368, which gives the Parliament of India the right to amend the laws of the constituent states of India with the assent of the President, cannot be freely applied in any way that would allow for either the amendment or abrogation of Article 370 under the powers extended through Article 370(1), because this does not fall under the matters specified either in the Union List or in the Concurrent List mentioned in Article 370(1). The last six decades have demonstrated however that the special status of Kashmir, which was intended to be based on full autonomy and self-rule, a kind of 'an autonomous republic within the Indian Union, with a separate President, National Assembly, Judiciary, Regional Autonomy and separate citizenship',[21] with special and symbolic privileges, such as its own flag, conferred on the state, has gradually been converted into the special status of a subordinate dominion directly ruled by the government of India, as both executive and legislative power, with the glaring omission of the Parliament of India,[22] and after 2019, with complete disdain for historical agreements, constitutional provisions and the will of the people.

The time slot during which any prerogative and power could potentially have been extended to the Union government through J&K government's concurrence was originally confined to the dissolution of the State's Constituent Assembly on 17 November 1956, whereupon all the authority under which the state government of J&K could accord its concurrence to the Union ceased:[23] 'the President [of India] cannot exercise his power to extend the Indian Constitution to Jammu and Kashmir indefinitely. The power had to stop at the point the State's Constituent Assembly drafted the State's Constitution and decided finally what additional subjects to confer on the Union, and what other provisions of the Constitution of India it should get extended to the State, rather than having their counterparts embodied in the State Constitution itself. Once the State's Constituent Assembly had finalized the scheme and dispersed, the President's extending powers ended completely'.[24] The purpose of the State's Constituent Assembly was to draft the Constitution of Jammu and Kashmir and once the Constitution came in force and the Assembly ceased to exist, the status of J&K became

'non-amendable'. Once the J&K Constitution was adopted, the 'Article 370 abrogation train' left the station.

Narasimha Gopalaswami Ayyangar, one of the 'fathers' of the Constitution of India, interpreted the clause in a way which was later considered authoritative: 'it is one of our commitments to the people and Government of Kashmir that no such additions should be made except with the consent of the Constituent Assembly which may be called in the State for the purpose of framing its Constitution'.[25] He further explained, 'So the provision is made that when the Constituent Assembly of the State has met and taken its decision both on the Constitution for the State and on the range of federal jurisdiction over the State, the President may on the recommendation of that Constituent Assembly issue an order that this article 306 (i.e. Article 370—P.B.) shall either cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified by him. But before he issues any order of that kind the recommendation of the Constituent Assembly will be a condition precedent. That explains the whole of this article'.[26] The provisions contained in Article 370 were made only for an interim period in the hope that before the Constitution of Jammu and Kashmir (CJ&K) was drafted and adopted by the J&K Constituent Assembly and became operative and before the Assembly ceased to exist, which materialised on 17 November 1956, the final status of Kashmir would already have been determined. This did not happen, however, and the provision initially meant to be transitory, became semi-permanent, which eventually led to the obvious conclusion found in the *Report of the State Autonomy Committee* (RSAC), set up in September 1996, after the National Conference Government came to power, that 'it should have been indicated as early as 1956 that it would be a misnomer to call Article 370 "Temporary provision"'(RSAC 2000: 103) and '[a]ccordingly, it is recommended as under: i. That the world "temporary" be deleted from the title of part XXI of the Constitution of India; and ii. That the word "temporary" occurring in the heading of Article 370 be substituted by the word "special"'.[27] When CJ&K was drafted, the general conviction was that 'with the Assembly's dispersal on 17 November 1956, after adopting the constitution of Jammu and Kashmir, vanished the only authority which alone could cede: (a) more powers to the Union and (b) accept Union institutions other than those specified in the Instrument of Accession. This understanding informed decisions right until 1957'.[28] Such an understanding also informed the Delhi Agreement (DA) of 24 July 1952 between Sheikh Abdullah and Jawaharlal Nehru, in which 'the Government of India agreed that, while the residuary powers of legislature vested in the Centre in respect of all states other than Jammu and Kashmir, in the case of the latter they vested in the State itself'.[29]

In this context, the ruling of the Indian Supreme Court in the case *Kesavananda Bharati vs State of Kerala* (SCI 1973-04-24) is most relevant inasmuch as the Supreme Court—while subscribing to the opinion that

'[t]he theory of referendum by State legislatures is not valid'—held that 'the very fact that the Constituent Assembly did not include referendum as one of the methods of amendment and that the Constitution makers excluded no part of the Constitution from amendment established that the amendment of a written Constitution can be legally done only by the method prescribed by the Constitution. If the method of referendum be adopted for purpose of amendment … that would be extra constitutional or revolutionary'. Applied to J&K, that is tantamount to saying that the only legitimate methods of amending the Constitution of the State are those prescribed by the J&K Constitution alone and no recourse to, for instance, a referendum as an expression of the voice of the people of J&K is legally possible.[30] We should, of course, clearly distinguish a referendum amending the Constitution, which has no legal place in the constitutional system for the time being, from a referendum of the people now living in the territories of PSJ&K determining the future status of the territories, which enjoys quite a different, authorised legal status and has become a part of the international legal ramifications surrounding the Kashmiri issue.

The importance of Article 370 has a number of dimensions, some of them often overlooked. J&K is included among the states of the Union through Article 1(2) of the Constitution of India, which defined (as of 1 April 2019),

> 1 'India, that is Bharat, shall be a Union of States.
> 2 The States and the territories thereof shall be as specified in the First Schedule.[31]
> 3 The territory of India shall comprise—
>
> a the territories of the States;
> b the Union territories specified in the First Schedule;[32] and
> c such other territories as may be acquired'.

The First Schedule of the Constitution of India mentioned 'Jammu and Kashmir' (under No. 2, original Part B) and, in its amended version, it specifies, '[15.] Jammu and Kashmir.—The territory which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir'. Thus, the Constitution of India seems to treat Jammu and Kashmir as an integral, constitutional part. However, the essential connective is Article 370(1)(c), which stipulates that 'the provisions of Article 1 and of this Article shall apply in relation to that State'. In other words, the applicability of Article 1(2) to Jammu and Kashmir, i.e. the inclusion of Jammu and Kashmir in the Union, is validated and made possible *exclusively* via the provision of Article 370(1)(c),[33] which in turn historically goes back to the provisions of IoAJ&K, through which the accession of PSJ&K to India was provisional and restricted to selected matters. Most significantly, the provisions of Article 370(1)(c), which are 'temporary and transitional', not only impose clear restrictions on the applicability of

the Union's legislative and executive powers towards J&K, which retains its autonomous status and possibly the right to some kind of a redefinition of its relationship with the Union in view of clauses 7 and 8 of IoAJ&K, but also may be interpreted as carrying certain consequences for any recognition of the territories as an integral and permanent part of the Union. However, an effective 'Kexit' option, or a withdrawal of Jammu and Kashmir from the Indian Union, seems rather precluded and there is no reference in the Constitution of India comparable to what we find in Pakistan's legislation, such as the declaration that 'the future status of the State of Jammu and Kashmir is yet to be determined', and no mention of a referendum (plebiscite) under UNSC and UNCIP resolutions. In this sense, the Constitution regards the status of IaJ&K as settled for all practical purposes, unlike the case with PaJ&K: this is an open issue for India (*vide infra*, §§ 10–11).

Like in Pakistan, any public debate, agitation or activity which would advocate a change of the current status of IaJK as officially sanctioned by the Indian government as an inalienable part of India, i.e. which would call for a plebiscite or the independence of Kashmir, is banned under the Unlawful Activities (Prevention) Act of 1967, which defines 'unlawful activity' as that '(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the *cession* of a part of the territory of India or the *secession* of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India' (UAPA, § (1)(o) (i)&(ii)), '"cession…" includes admission of the claim of any foreign country to any such part', and '"secession…" includes the assertion of any claim to determine whether such part will remain a part of the territory of India'. The government of India has used this law on numerous occasions to ban organisations or imprison individuals who campaign for plebiscite or independence.[34]

The Articles 1(3)(c) and 2 of the Constitution jointly contain a provision, analogous to Article 1(2)(d) of the Constitution of the Islamic Republic of Pakistan of 1973, to incorporate the remaining territories of PSJ&K, currently under the administration of Pakistan (AJK, GB). Even the wording of Article 1(3)(c) of the Constitution of India, adopted on 26 November 1949, echoes the phraseology of Pakistan's Objectives Resolution adopted on 12 March 1949, subsequently incorporated in all constitutions of Pakistan ('such other territories as may hereafter be included in or accede to Pakistan').

Notes

1. Wirsing (1995: 75). See also EPD-MEA (2004: 1) = Gupta (2003–2006, IV: 18).
2. E.g., A.G. Noorani (2011, 2013), reproducing historical documents and providing their detailed analysis, also: SarDesai (1992), Hassan Khan (2011), Webb (2012), Bhat (2017) and Lone (2018); cf. Diwan (1953), Siraj (2011).

3. For a different view, see Noorani (2013, I: 72 ff.), who refers to some historical documents: 'Minutes of the meeting of the Defence Committee of the Cabinet (DCC) on 25 October 1947 presided over by Mountbatten, shows that India did not rush to accept the accession'. For a slightly different assessment of these documents, see Hingorani (2016: 160 ff.).
4. Noorani (2011: 3), text in Noorani (2011: 37–43).
5. Lamb (1991: 121–141, 1994: 44–47, Schofield (2003: 73–97).
6. For the full text, see, e.g. Lakhanpal (1965: 57), Lamb (1991: 137, 1994: 44) and Noorani (2011: 43).
7. *White Paper* (1948: 55), Lamb (1991: 138, 1994: 147–148).
8. A number or relevant resolutions were adopted by the UN bodies, and these include UNSCR 38, UNSCR 39, UNSCR 47, UNSCR 51, UNSCR 80, UNSCR 91, UNSCR 122, UNSCR 126, as well as UNCIP (1948, 1949). In addition, a proposal was drafted: UNSCP (1949).
9. See also Furber (1951: 368).
10. (1a) *Defence*: IoAJ&K, §§ 1,2 = FLL-GIA (1935, §§ 1,2), excluding 'central intelligence bureau preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States', 'the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas'; (1b) *Defence*: IoAJ&K, §§ 3,4 = FLL-GIA (1935, §§ 29,30). (2) *External Affairs*: IoAJ&K, §§ 1,2,3 = FLL-GIA (1935, §§ 3,17,49). (3) *Communication*: IoAJ&K, §§ 1–9 = FLL-GIA (1935, §§ 7,20,18,22,24,25,26,39). (4) *Ancillary*: IoAJ&K, §§ 1 ('Elections to the Dominion Legislature'), 2 ('Offences against laws…'), 3 ('Inquiries and statistics…'), 4 (qualified 'jurisdiction and powers of all courts…') = FLL-GIA (1935, §§ 40,42,43,53).
11. E.g., Diwan (1953: 343) or Hingorani (2016: 132), who claims that New Delhi had no power to grant Kashmir any special 'proviso to the unconditional accession', and hence the accession had to be unconditional and irreversible.
12. Patel (1971–1974, Vol. 1: 162–163, Doc. no. 124).
13. Patel (1971–1974, Vol. 1: 166, Doc. 127).
14. Cf. Schofield (1996: 167).
15. For its history and analysis, see Noorani (2011), also Noorani (2013, I: 549–568).
16. The literature on Article 370 is vast, to mention but a few monographs: Anand (2016), Teng (1990), Noorani (2011) and Bhat (2017).
17. 'Temporary, Transitional and Special Provisions', since 1962 through the Constitution (Thirteenth Amendment) Act.
18. For a handy analysis with comments, see Cottrell (2013: 169–170).
19. Which replaced the previous: 'as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948', on 15 November 1952 through Ministry of Law order No. C.O.
20. See Noorani (2011: 5–6).
21. Mirza Afzal Beg, the Chairman of the Basic Principles Committee of the State Constituent Assembly, on 24 March 1952, quoted in: Teng (1990: 100).
22. Cf. Hingorani (2016: 327–342).
23. Cf. Noorani (2013, I: 562).
24. Noorani (2011: 5).
25. See p. 71 in 'Ayyangar's Detailed Exposition of Article 370 (306-A in the Draft) in the Constituent Assembly on 17 October 1949' (CAD, Volume X, pp. 422–7), in Noorani (2011: 64–72).

26. See p. 71 in 'Ayyangar's Detailed Exposition of Article 370 (306-A in the Draft) in the Constituent Assembly [of India—P.B.] on 17 October 1949' (CAD, Volume X, pp. 422–7), in Noorani (2011: 64–72, 2013, I: 560–363).
27. RSAC (2000: 104). Cf. Hingorani (2016: 335–337).
28. Noorani (2013, I: 563); cf. Noorani (2011: 7–8).
29. Das Gupta (1968: 198–207).
30. Cf. Hingorani (2016: 127–130).
31. The original 'The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule', substituted by the Constitution (Seventh Amendment) Act, 1956, known also as the States Reorganisation Act, which significantly reformed the boundaries of India's states and territories.
32. The original 'the territories specified in Part D of the First Schedule' substituted by the Constitution (Seventh Amendment) Act, 1956.
33. See Noorani (2011: 6): 'Article 1 is thus applied to the State through Article 230'.
34. For example, in 1992, the Government of India imposed a ban on the Jamaat-e-Islami Hind, the ban was rejected by the Supreme Court in 1994; see Noorani (2013: 536–541).

10 Jammu and Kashmir vis-à-vis India

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Kashmir's legal counterpart of India's Constitution, describing its liaison with the Union, is the Constitution of Jammu and Kashmir (CJ&K). During the six decades of its existence, the document has undergone significant changes forced upon it by the central government which has quite often violated its original spirit and the intentions of the Constituent Assembly. It defines the territories of J&K as an *integral* part of India: 'We, the people of the State of Jammu and Kashmir, having solemnly resolved, in pursuance of accession of this State to India which took place on the twenty-sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof…' (Preamble), and 'The State of Jammu and Kashmir is and shall be an integral part of the Union of India' (Section 3).[1] Such territorial integrity as a permanent solution has, however, been consistently contested in all debates by both Pakistan and the vast majority of Kashmiris living on both sides of the Line of Control (LoC). As Pakistan Foreign Office Spokesman Nafees Zakaria rhetorically asked at a UN Summit in 2016: 'If Kashmir is India's "integral part" then why is it on UN agenda?'.[2] It should also be remembered that back in the early 1950s, before the J&K Constitution was adopted in 1956, it was generally accepted that the State could secede from the Indian Union by a bilateral act of the State and the Union and IoAJ&K was not an irreversible operation.[3]

The J&K Constitution (Section 48) treats the PaJK as occupied parts of IaJK, claimed to be *de jure* integral parts of India as well,[4] and allots separate 25 (24, before 1975) seats for the representatives of those territories in the Legislative Assembly '…until the area of the State under the occupations of Pakistan ceases to be so occupied and the people residing in that area elect their representatives'. Accordingly, the Constitution treats all the territories of PSJ&K as remaining integral parts of J&K, considered its legitimate and legal successor. That is entailed by Section '4. Territory of the State: The territory of the State shall comprise all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State', i.e. *all* the territories of PSJ&K, including those held by Pakistan.

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Sections 3 and 4 are obviously highly problematic in legal terms. In the first place, they directly contravened the spirit of earlier UNSC and UNCIP resolutions, such as UNSC resolutions 47 and 51 (1948), UNCIP resolutions (1948 and 1949) and UNSC resolution 80 (1950). Further, the Jammu & Kashmir National Conference's call, of 27 October 1950, to convene a Constituent Assembly that would determine the future shape and affiliation of the State of Jammu and Kashmir was followed by UNSC resolution 91 of 30 March 1951 which 'remind[ed] the Governments and authorities concerned of the principle embodied in its resolutions 47 (1948) of 21 April 1948, 51 (1948) of 3 June 1948 and 80 (1950) of 14 March 1950 and the United Nations Commission for India and Pakistan resolutions of 13 August 1948 and 5 January 1949, that *the final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations* (italics—P.B.)'. The resolution was explicit in '[a]ffirming that the convening of a Constituent Assembly as recommended by the General Council of the "All Jammu and Kashmir National Conference" and *any action that Assembly might attempt* to take to determine the future shape and affiliation of the entire State or any part thereof *would not constitute a disposition of the State* in accordance with the above principle (italics—P.B.)'.[5] Soon after, on 1 May 1951, disregarding the UN resolution, Yuvrāj ('heir-apparent') Karan Singh, as the head of the state in whose favour the Maharaja had earlier abdicated, issued a proclamation for forming a Constituent Assembly in Jammu and Kashmir, the constitution of which was highly problematic inasmuch as the representatives of the Kashmiris on the Pakistani-held territories were effectively excluded, since the unprepresentative polls were to be conducted only in Indian-held territories between August and September 1951, and there was no mechanism to co-opt the Kashmiris from the other side of the ceasefire line.

The move prompted new protests and complaints from the Pakistani side before the UN Security Council,[6] which in turn reacted by reiterating its previous position: 'The Council trusts that the Governments of India and Pakistan will do everything in their power to ensure that *the authorities in Kashmir do not disregard the Council or act in a manner which would prejudice the determination of the future accession of the State* in accordance with the procedures provided for in the resolutions of the Council and of the United Nations Commission for India and Pakistan (italics—P.B.)'.[7] In the end, the Assembly convened for the first time on 31 October 1951.[8] This resulted in another resolution UNSCR 96 adopted on 10 November 1951, and thereafter the United Nations representative was dispatched to India and Pakistan. The ping-pong game continued in which India repeatedly bounced back UNSC resolutions and continued its policy of *fait accompli*. Against the backdrop of the environment that emerged after Sheikh Abdullah had unconstitutionally been dismissed as prime minister on 8 August 1953,[9] in

the 75-member Constituent Assembly, 64 of the members who were present unanimously voted for the state's accession to India, against the international agreements. The adoption of the Constitution by the Constituent Assembly on 17 November 1956 triggered UNSC resolutions (122 of 24 January 1957 and 126 of 2 December 1957), which repeated the previous appeals that 'the final disposition of the State of Jammu and Kashmir … be made … through the democratic method of a free and impartial plebiscite' and emphatically 'declare[d] that the convening of a Constituent Assembly … and any action that Assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the Assembly, would not constitute a disposition of the State in accordance with the above principle'. Accordingly, from the point of view of international law and the recognition of the international community, Sections 3 and 4 of the CJ&K *cannot* be considered legitimate and valid.

The Constitution contains the important Section 147 of Part XII, 'Amendments of the Constitution', which through certain safeguards introduced serious limitations regarding unrestrained amendments of the constitution, and grants immunity from meddling in the contents concerning vital aspects of it. Any amendment of the constitution requires at least two-thirds of both houses of the State Legislature, i.e. the Legislative Assembly and the Legislative Council and the acceptance of the Sadar-i-Riyasat (head of the state), who was to be elected by the Legislative Assembly. Section 147 is self-referential and makes itself immune to *any* amendment, even with the two-thirds majority of the State Legislature. Further, three more areas were made immune from any change. Section 3 transforms J&K into 'an integral part of the Union of India', effectively impeding any kind of future 'Kexit', which is in stark contrast to the Kashmir-relevant legislation in Pakistan. The Pakistani solution, at least in theory, leaves a window open for a process that could determine the future status of Kashmir, with all options on the table. The Indian stance is reinforced through Section 48 which allocates additional seats in the Legislative Assembly reserved for the representatives of the Pakistani-administered territories that remain vacant as long as they are under 'the occupation of Pakistan'. Accordingly, the Constitutions of India and of Jammu and Kashmir allow for only one option: a total merger of all Kashmiri territories with India. Therefore, both constitutional acts should be regarded as contravening international law and the UN resolutions which clearly specify that it is only up to the people of Kashmir to decide about their future fate.

Another 'non-amendable' area is Section 5, 'Extent of executive and legislative power of the State', which may in itself seem ambiguous and content free at first but refers directly to the Article 370(1)(a)(i) of the Constitution of India, which adopts the division of prerogatives between the centre and Kashmir as defined in IoAJ&K. From the perspective of the state legislation, this should guarantee the full, non-negotiable autonomy

of J&K, independent of the powers of the central government and Indian Parliament, except for such matters as defence, foreign affairs and communications. No bill could be introduced in either the State Legislature or the Indian Parliament which would go beyond these clearly defined limits. Regrettably, that is the theory, but it has never been respected by the central power of India, which has violated it continuously. The last non-amendable area has been, until recently, Article 370, which is the only section defining the relationship between the State and the Union. It is the only article which formulates '(c) the provisions of the Constitution of India as applicable in relation to the State', mentioned in Section 147, this time from the perspective of the legislation of the Union of India. Full autonomy and self-rule, independent of any interference from the political centre in Delhi, is the foundation of the Constitution and, alongside Article 370, lays down the basic principles of the liaison between India and the State, unfortunately, constantly violated.[10]

A perfect illustration of such illegitimate interference from the centre is the constitutional structure of power in J&K. The powers of the Kashmiri legislature and executive are, on paper, confined to matters delineated in IoAJ&K, retained intact through Section 5 mentioned earlier (also in CI, Art. 370), which *in theory* should guarantee extended autonomy and self-rule to the State. Unamended Section 46, on 'Legislature for the State', originally provided that '[t]here shall be a Legislature for the State which shall consist of the Sadar-i-Riyasat and two Houses to be known respectively as the Legislative Assembly and the Legislative Council'. Further, the head of the state was to be the same Sadar-i-Riyasat ('head of the state') elected by the State Legislature,[11] a solution also accepted in the 1952 Delhi Agreement (DA). For someone to hold the office of Sadar-i-Riyasat it was necessary, through Section 27,[12] to have the status of a permanent resident of the State, that is being 'a State Subject of Class I or of Class II' prior to 1954 through Section 6(1)(a) or a State Subject of Class III through Section 6(1)(b), roughly corresponding to the categories of the State Subject Definition Notification (SSDN) of 1927. An important function of the elected Sadar-i-Riyasat was to appoint the prime minister of J&K as well as all other ministers on the latter's advice, through Section 36. Perhaps not the most democratic solution, it nevertheless expressed in an imperfect manner the principle of the autonomy of the J&K government as a semi-elected body representing the people. These arrangements reflected to some degree the idea of self-determination, and its corollaries, the right of a subject to take part in the government of his country, directly or indirectly through elected representatives, the right to equal access to public services and the requirement that 'the will of the people shall be the basis of the authority of government', being a part of international law and the framework of legal protection of human rights.

The situation changed dramatically with the CJ&K (Sixth Amendment) Act enacted on 10 April 1965,[13] and in particular Section 4, which replaced the elected Kashmiri (State Subject) Sadar-i-Riyasat with a governor

'appointed by the President' of India, who does not have to be a Kashmiri (state subject). The move was unconstitutional because firstly, it violated the principle of immunity to amendments as regards any change of the constitutional power structure as laid down in Section 147, and secondly, it required the assent of the head of the state (Sadar-i-Riyasat) which was not forthcoming.[14] As a consequence, with the replacement of the Sadar-i-Riyasat with the centre-nominated governor, the mechanism of designating the state government also changed: the chief minister (renamed 'prime minister') and other government ministers now came to be appointed by the governor, i.e. indirectly by the centre in Delhi. Furthermore, the Sadar-i-Riyasat was significantly referred to in Article 370(1)(b)(ii) (Explanation) as the office which grants the concurrence of the State to the orders of the President of India, viz. either accepts or dismisses the validity and applicability of such orders. Once the office of the Sadar-i-Riyasat as an elected representative of the Kashmiri people was dismantled and replaced with the presidentially imposed governor, the concurrence of the Government of the State became farcical, transformed into a phony game played by the President of India who issues orders for J&K and the same President who appoints and dismisses a governor, who in turn accords his concurrence to them.

Through this consequential amendment, the previously mentioned principles of autonomy and self-government (reflected in the office of the elected head of state and government), the people having their representatives in the government, having equal access to public offices in one's country, the government representing 'the will of the people' were dismantled and replaced with the nomination of the head of the state, possibly an outsider, by the Indian president, likewise an outsider to Kashmir. To restore the office of Sadar-i-Riyasat as an elected representative of the Kashmiri people has been a recurrent demand over the years.[15] Their tangible result was a bill moved by a member of the J&K Legislative Assembly, Mohammad Yousuf Tarigami, seeking an amendment to CJ&K that would reintroduce the office of Sadar-i-Riyasat, who would have to be a permanent resident of J&K, i.e. a state subject, and elected by the Legislative Assembly for a five-year term, in place of governor and thereby reverting to the pre-1965 situation. The bill was rejected at the introduction stage by the BJP-PDP-dominated Assembly on 29 June 2016.[16]

The viability of the J&K Constitution and the state's autonomy is contingent on the link established via Article 370 of the Indian Constitution, which sets certain formal restrictions on how the centre exercises its powers vis-à-vis J&K. Sub-clauses 370(1)(b)(i), 370(1)(b)(ii), 370(1)(d) and Article 370(3), adopted in 1949, well before any work on the J&K Constitution even started, made certain *temporary* provisions for the Indian government in the person of the President to administer the State through presidential orders within limits specified in IoAJ&K. Through Article 370(2), the provisional character of such a solution was understood until the Constituent Assembly convened and decided on the legality and compatibility of the new laws issued

by the president with the constitution. The Constituent Assembly was the ultimate legal body responsible for either accepting or rejecting such temporary presidential orders, which secured the concurrence of the J&K government for the interim period.[17] Moreover, the President's right to issue orders was interpreted as a one-off solution, and the right to issue orders once used, with the orders submitted before the Constituent Assembly, was considered exhausted. In a note on the legal and constitutional aspects, dated 6 September 1952,[18] Rajendra Prasad, the first President of India, reiterated some points made earlier by Gopalaswami Ayyangar and rejected the very legality of a sequence of presidential orders promulgated over a period of time, saying: 'I have little doubt myself that the intention is that the power is to be exercised *only once*'. What was initially conceived as a mechanism to administer the territories with presidential orders to be approved by the Constituent Assembly *before* the Constitution was drafted was eventually transformed into a mechanism of permanent interference and the imposition of the Delhi-favoured order through presidential orders in violation of the constitutional mechanisms of both India and J&K.

Over the course of time the integrity, independence and autonomous character of the local powers and legislature of J&K, as defined in the Constitution of India through Article 370, has been abused on numerous occasions by decisions of the political centre in Delhi, primarily presidential orders, by unconstitutional amendments to CJ&K without proper legal approval, or the concurrence, of the Kashmiri side and by certain judgements passed by the Supreme Court of India.[19] As a consequence, for instance, 'the State's Constitution itself was overridden by those (President's—P.B.) Orders. Its basic structure was altered. The head of state elected by the State Legislature was replaced by a Governor nominated by the Centre. Article 356 (imposition of President's rule) was applied despite a provision in the State's Constitution for Governor's rule (Section 92). This was done on 21 November 1964'.[20]

In compliance with Clause 1 of IoAJ&K, the ultimate appellate authority became the Supreme Court of India. Altogether there have been three important legal cases, involving Article 370 and the (il)legitimacy of presidential orders, considered by the Supreme Court of India. In the first,[21] of precedent character, *Prem Nath Kaul versus State of Jammu and Kashmir* of 1959 (SCI 1959-03-02), the Supreme Court recognised that '… Art. 370, el. (2) prescribes that if the concurrence of the Government of the State required by the relevant sub-cl[ause]s of cl[ause] (1) has been given before the Constituent Assembly of Kashmir has been convened, such concurrence shall be placed before such Assembly for such decision as it may take thereon. This clause shows that the Constitution makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provisions of Art. 370(1) *is made conditional on the final approval by the said Constituent Assembly* (italics—P.B.) in

the said matters'. With respect to Clause 370(3), which authorises the president to abrogate Article 370 altogether, the Supreme Court rules that 'this power can be exercised by the President *only if the Constituent Assembly of the State makes recommendation in that behalf* (italics—P.B.). Thus the proviso to el. (3) also emphasises *the importance which was attached to the final decision of the Constituent Assembly of Kashmir* (italics—P.B.) in regard to the relevant matters covered by Art. 370'. In the same way, the Court sided with the opinion that the provisions granting the President of India special powers to issue orders for the State were of temporary character, until the Constituent Assembly convened: 'The Constitution-makers were obviously anxious that the said relationship [between J&K and India—P.B.] should be finally determined by the Constituent Assembly of the State itself; that is the main basis for, and purport of, the temporary provisions made by the present Article; and so the effect of its provisions must be confined to its subject-matter'. By implication, once the Constituent Assembly convened, and later adopted the final version of the Constitution, the special presidential powers became lapsed.

In the second ruling, *Sampat Prakash versus State of Jammu and Kashmir* of 1968 (SCI 1968-10-10), the Supreme Court took a U-turn and adopted the stance that Article 370 had not ceased to be operative in the sense that the President of India remained fully empowered to make orders for the state despite the dissolution of the Constituent Assembly.[22] This surprising judgement, contrary in spirit to the previous verdict, was reached by a bench presided over by Chief Justice Mohammad Hidayatullah, who had been a member of the jury which had adjudged in the previous case of 1959, but who at the same time was an *active politician* and just a few months later, on 20 July 1969, became the Acting President of India and Vice-President of India in 1979. The ruling was problematic due to four basic flaws.[23] It relied on an inadequate and flawed assessment of recent history and ignored historical material and documents that were behind the genesis of the Constitution of India, including the N. Gopalaswami Ayyangar's exposition. Despite mentioning them explicitly, it provided a blatantly distorted, legally unwarranted and illogical reading of Articles 370(2) and (3), and misconstrued the Constituent Assembly's explanation (of terminological character) as a legal recommendation. As a consequence, it granted unconditional authority to the Government of India to extend any provisions to J&K as if the restrictions of Article 370 did not exist, and accepted the right of the Government of India to withdraw from earlier agreements and interpretations of the true purport of Article 370. Further, the Supreme Court proved to be completely oblivious to the precedent of *Prem Nath Kaul versus State of Jammu and Kashmir* of 1959 despite Chief Justice being personally acquainted with it as a member of that bench. It is even more surprising that sometime later, in the case *Madhav Rao versus Union of India* of 1970 (SCI 1970-12-15), though not directly related to Article 370 but concerning the status of former princely states and maharajas in general, exactly the same bench

of the Supreme Court opined that '[t]he assurances and guarantees being that of the people in the Constitution, the Executive Government could not by the indirect device of withdrawing the recognition of the Rulers avoid the obligation created by the Constitution', and that '[t]he negotiations, the assurances given by leading statesmen, and the terms of the covenants and agreements were certainly not intended to be an exercise in futility'. The same principle extended to Article 370 would mean that earlier interpretations given, for instance, by Gopalaswami Ayyangar and Rajendra Prasad and their Kashmiri counterparts at the time when the Constitution of India was being adopted could not be altered if the spirit of Article 370 would be changed thereby. Similarly, in the third case, *Mohammed Maqbool Damnoo versus State of Jammu and Kashmir* of 1972 (SCI 1972-01-05), the Supreme Court took no notice of the 1959 precedent, albeit it did refer to the ruling in the case *Sampat Prakash versus State of Jammu and Kashmir* of 1968,[24] and based its own judgement on similarly faulty grounds and a methodologically misconstrued interpretation that there are no limits when amending the CJ&K and for the President of India to issue orders under Article 370,[25] whereas the whole article speaks to the contrary and without such limitations the whole article would simply have no substance.[26] Moreover, the Supreme Court interpreted the crucial CJ&K (Sixth Amendment) Act of 1965 as a mere terminological change from 'Sadar-i-Riyasat' to 'Governor', ignoring the political and constitutional ramifications of the amendment which effectively replaced an elected state subject officer with a non-elected presidential nominee from Delhi.[27] The actual procedure which leads to the assignment as head of state is central in this case and cannot merely be brushed aside with a clearly erroneous conclusion that '[t]he Governor is not elected as was the Sadar-i-Riyasat, but the mode of appointment would not make him any the less a successor to the Sadar-i-Riyasat. Both are heads of the State'. With the dismissal and arrest of Sheikh Abdullah in 1953 and a new legal interpretation validating the practice, the norm became that, as the Governor of J&K in the period 1981–1984, Braj Kumar Nehru (1997: 614–615) notes, '[f]rom 1953 to 1975, Chief Ministers of that State had been nominees of Delhi. Their appointment to that post was legitimised by the holding of farcical and totally rigged elections in which the Congress party led by Delhi's nominee was elected by huge majorities'. And the practice has not abated in any way.[28]

Both the judgements of the Supreme Court of India delivered in 1968 and 1972 can hardly be regarded as fulfilling the criteria of a bipartisan and apolitical analysis of facts. Their practical negative repercussions can easily be seen in presidential orders decreed expeditiously under Article 370, which 'was used freely not only to amend the Constitution of India but also of the State. On 23 July 1975 an order was made debarring the State legislature from amending the State Constitution on matters in respect of the Governor, the Election Commission, and even the composition of the Upper House, the Legislative Council'.[29] The centre in Delhi could now formally claim that

presidential orders enacted in a continual series were legitimately enforced having obtained the concurrence of the state government in the person of the governor nominated by the centre,[30] even though such a procedure defies one of basic requirements of democracy and human rights such as the representative character of the local government, which should not be imposed by a foreign or outside power. Even more so, the mechanism of presidential orders for Kashmir breaches the *principles*, though not the letter, of the Constitution of India, bypasses the requirement that laws are ultimately established by the legislature and violates the separation of the executive and legislature: 'Article 368 of the Constitution of India mandates that a constitutional amendment in relation to states in India would require a two-thirds vote of both Houses of Parliament, along with ratification by one half of the states. For PIS of J&K ("princely Indian state of Jammu and Kashmir"—P.B.), executive orders under Article 370 have sufficed to bring about constitutional amendments till date'.[31] As a result, up to 2000, when the *Report of the State Autonomy Committee* was published, 94 of the 97 entries in the Union List and 26 entries in the Concurrent List had been applied to the State, even though as early as in 1954 the Concurrent List did not apply at all,[32] and in addition 'as many as 260 provisions of the Constitution out of 395 ha[d] been extended to our State'.[33] The extra-constitutional model which sidesteps the Indian Parliament also enables the Government of India 'to grant immunity to the coercive state laws from being challenged as being inconsistent with the guaranteed fundamental rights contained in the Constitution of India',[34] such as Armed Forces Special Powers Act (AFSPA), Terrorist and Disruptive Activities (Prevention) Act (TADA) and Prevention of Terrorism Act (POTA).[35] The importance of such rulings also lied in the fact that they boosted political voices, such as nationalists, Indian bureaucrats, Kashmiri Pandits or radical Hindutva groups,[36] that had been arguing for years that Article 370 should be repealed altogether under Article 370(3).[37]

It was taken for granted that with the accession of PSJ&K, under Clause 8 of IoAJ&K, the legitimate residents of the State would retain their separate privileged status as state subjects, i.e. their separate citizenship of the state, as defined in SSDN of 1927. It was presumed that the previous laws would continue unchanged except for those three main domains defined in the Schedule to IoAJ&K. In all remaining aspects, the State was supposed to retain its independence and IoAJ&K did not regulate the citizenship issue, hence it would not be embraced by the laws of India. This prevalent understanding was, for instance, emphasised by Mirza Afzal Beg, the Chairman of the Basic Principles Committee of the State Constituent Assembly in his speech in 1952, who spoke of 'Regional Autonomy and separate citizenship' for Kashmir.[38] Such a dual citizenship status, which would reflect the autonomous character of the State, was perfectly conceivable both in theory and in practice. Dual citizenship was neither a stranger in the legal system of the British Commonwealth or even earlier nor was the concept of strong autonomy or sovereignty within a large federation astonishing. A certain

weak analogy at least *on paper* did already exist at that time, though flagrantly abused in practice: two Soviet Socialist Republics, the Ukrainian SSR and the Byelorussian SSR were among the founding members of the United Nations and UN Member States as politically sovereign, or rather 'pseudo-sovereign', entities distinct from the Soviet Union and enjoyed the status of sovereign Soviet socialist states through Article 15 of the 1939 Constitution of the USSR (Artt. 76 and 81 of the 1977 Constitution of the USSR) though like all the remaining republics within limitations imposed by Article 14, such as foreign affairs, defence, communications, foreign trade etc. (somehow akin in character to the Union List or in the Concurrent List). They did not, however, translate into a separate Ukrainian or Byelorussian citizenship in addition to the Soviet one.

The idea of a separate Kashmiri citizenship was seriously modified through the DA of 1952 which stated that 'it was agreed between the two Governments that in accordance with Article 5 of the Indian Constitution, persons who have their domicile in Jammu and Kashmir shall be regarded as citizens of India, but the State legislature was given power to make laws for conferring special rights and privileges on the "state subjects"…'. Accordingly, the DA did not retain a separate Kashmiri citizenship for J&K residents but replaced it with a *qualified* Indian citizenship in the sense that 'special rights and privileges' were to be conferred on the 'state subjects', over and above the rights entailed by ordinary citizenship. Through this arrangement, the independent citizenship status of the Kashmiris in the political sense was compromised and diluted in the Union citizenship. Ironically, the 'special privileges' have taken an unexpectedly sinister twist over the decades with the Kashmiris deprived of more fundamental political human rights to a much larger degree than many other national groups within the Union of India. The distinction between Kashmiri citizenship and Indian citizenship has not only been diluted and blurred as in the case of AJK but has been practically made to disappear altogether. What was retained were certain vestiges of the State Subject laws, which were retained in the CJ&K under the idea of 'permanent residentship', which included state subjects of Class I or of Class II who were permanent residents in Jammu and Kashmir before 1954 (Section 6(1)(a)), immovable property owners living there for at least ten years before 1954 (Section 6(1)(b)), a category comparable to state subjects of Class III or former state subjects who are returnees from Pakistan. Further, both the Citizenship Rules of 1956 and the Citizenship Rules of 2009 make no mention of any special status accorded to or extraordinary provisions for J&K residents, even though both contain sections with reference to Assam.

A legal aspect of symbolical dimensions is that, similar to the legislation of PaJK, the legislation pertaining to IaJK contains a comparable loyalty clause in the oaths of state ministers, deputy ministers and judges of the High Court: 'I will bear true faith and allegiance to the Constitution of the State …, *I will uphold the sovereignty and integrity of India* (italics—P.B.)'

(Fifth Schedule, *ad* Sections 40, 64 and 97). The oaths or affirmations to be made both by a candidate for election to the State Legislature and by a member of the State Legislature contain precisely the same loyalty clauses. The first part of the oath is a pledge of allegiance to J&K *as legally constituted within India*, not as an autonomous state or a state of undetermined status, whereas the second, italicised part was inserted through Section 18 of the CJ&K (Sixth Amendment) Act, 1965, and is an Indian counterpart of the Pakistani 'cause of accession of the State of Jammu and Kashmir to Pakistan', the difference being that Indian-imposed laws in Jammu and Kashmir assume that its status has already been determined and it is an integral part of India, whereas Pakistani-imposed laws in AJK consider the status of the territories 'yet to be determined'. The exception is the Oath of Office of the governor (Section 31). Unlike all other oaths, this particular one makes no reference to India, but instead only to J&K and to the well-being of the people of the state. This difference conspicuously highlights the fact that the governor, since 1965, is a non-Kashmiri, a kind of a 'foreign body' within the Kashmiri tissue, representing the interests of the political centre in Delhi and not the interests of the Kashmiris.

Notes

1. Cf. Das Gupta (1968: 225).
2. Rasheed (2016).
3. Cf. Diwan (1953: 347).
4. Cf. Farrell (2003: 301).
5. Cf. Korbel (1954: 119–222).
6. Hingorani (2016: 222–227).
7. Text in Wellens (1990: 341).
8. JKCAD, I: 1.
9. Lamb (1991: 202), Noorani (2013: 398–455), Hingorani (2016: 135–136, 231).
10. Cf. Noorani (2011: 14 ff.).
11. Through Article 26 (original), 'The Sadar-i-Riyasat shall be the person who for the time being is recognised by the President as such:
    Provided that no person shall be so recognised unless he:—
    (a) is a permanent resident of the State;
    (c) has been elected as Sadar-i-Riyasat by a majority of the total membership of the Legislative Assembly in the manner set out in the First Schedule.
12. '27. The Sadar-i-Riyasat shall be the person who for the time being is recognised by the President as such:
    Provided that no person shall be so recognised unless he:
    (a) is a permanent resident of the state;
    (b) is not less than twenty-five years of age; and
    (c) has been elected as Sadar-i-Riyasat by a majority of the total membership of the Legislative Assembly in the manner set out in the First Schedule'.
13. Text in Noorani (2011: 331–335). See also Hingorani (2016: 30 ff.).
14. See also Noorani (2011: 14): 'On 26 November 1966, the Governor replaced the Sadar-i-Riyasat after the State's Constitution had been amended on 10 April 1965 by the Sixth Amendment in violation of Section 147 of the Constitution. Section 147 makes itself immune to amendment. It referred to the Sadar-i-Riyasat and required his assent to constitutional amendments. He

was elected by the Assembly (Section 27[2]). To replace him by the Centre's nominee unconstitutionally was to alter the basic structure of the Constitution'. Cf. Noorani (2011: 563).

15. See, e.g., the plea in Noorani (2011: 26–27, 472–474).
16. See *The Hindu* (2016-06-30) and Tanveer ul Ahad (2016).
17. See President Rajendra Prasad's legal note in Noorani (2011: 207): 'While it (CI—P.B.) safeguards in clause (2) the right of the Constituent Assembly of Jammu and Kashmir to revise or annul any action taken by the Government of that State in giving concurrence under clause 1(b)(ii) and the second proviso to clause 1(d) of Article 370, it excludes altogether the Parliament of India from having any say regarding the Constitution of Jammu and Kashmir …'.
18. Text in Noorani (2011: 205–210), see also Noorani (2011: 8–9).
19. Noorani (2011: 14–21).
20. Noorani (2011: 14). Cf. also Noorani (2011: 563).
21. In an earlier case relating to Article 370, *P.L. Lakhanpal vs The State Of Jammu And Kashmir* (SCI 1955-12-20), the Supreme Court merely stated that 'the President was authorized to make [Constitution (Application to Jammu and Kashmir) Order, 1954] under article 370', without going into further details. In another, much later case *Khazan Chand etc. vs State of Jammu and Kashmir* of 1984 (SCI 1984-02-09), the Supreme Court merely asserts generally that '[t]he Constitution of India, however, does not apply in its entirety to the State of Jammu and Kashmir because that State holds a special position in the constitutional set up of our country. Article 370 of the Constitution of India makes special provisions with respect to the State of Jammu and Kashmir'.
22. E.g. 'in the context of the Constitution we must give the widest effect to the meaning of the word "modification" used in Art. 370(1) and in that sense it includes an amendment. There is no reason to limit the word "modification" in Art. 370(1) only to such modification as do not make any "radical transformation";' 'Article 370(2) only refers to the concurrence given by the Government of the State before the Constituent Assembly was convened and makes no mention at all of the completion of the work of the Constituent Assembly or its dissolution. The power under the Article is to be exercised from time to time and includes within it the power to add, amend, vary or rescind'; with respect to Article 370(3), 'the Constituent Assembly of the State made a recommendation that the Article should be operative with a modified Explanation. Therefore the Article did not cease to be operative'; and 'the powers of the President under Art. 370 have to be exercised and the applicability of Art. 368 (reg. amendments of the constitution—P.B.) to the State does not curtail the President's power under Art. 370'. These conclusions are closely followed in a recent case *State Bank Of India vs Santosh Gupta* (SCI 2016-12-16), in which the Supreme Court accepts that the prerogatives of the Government of India, Indian Parliament and the president can be extended to a required degree, and 'the word "modification" must be given the widest meaning and would include all amendments which either limit or restrict or extend or enlarge the provisions of the Constitution of India. For this reason also it is clear that nothing can ever be frozen so long as the drill of Article 370 is followed'.
23. For details see Noorani (2011: 15–16).
24. Two judges on its bench were the same as in the 1968 case, i.e. J.M. Shelat and G.K. Mitter.
25. 'We have, therefore, no difficulty in holding that art. 370(1)(b) and art. 370 (1)(d) place no limitation on the framing or amendment of the Constitution of Jammu and Kashmir. if there is a limitation it must be found in the Constitution of the State'.

26. For details see Noorani (2011: 16).
27. 'Just as a change in the designation of the head of that Government was earlier brought about by the introduction of the office of Sadar-i-Riyasat, so too a change had been brought about in his designation from that of Sadar-e-Riyasat to the Governor. That was necessitated by reason of the Governor having been substituted in place of Sadar-e-Riyasat. There is no question of such a change being one in the character of that Government from a democratic to a non-democratic system'; 'it is quite clear that the Governor is competent to give the concurrence stipulated in art. 370 and perform other functions laid down by the Jammu and Kashmir Constitution'.
28. Cf. Noorani (2011: 13).
29. Noorani (2011: 14).
30. Such defence of New Delhi is not 'technically correct', as Hingorani (2016: 329) argues, inasmuch as it the concurrence is obtained from a governor in an office installed through the Sixth Amendment of 1965, which violated the legal principles of the Constitution of Jammu and Kashmir as well as of the Instrument of Accession, hence the legal basis for such a defence is flawed similarly to the *fruit of the poisonous tree* case of evidence obtained from an illegal source.
31. Hingorani (2016: 332).
32. RSAC (2000: 8).
33. RSACD (2000: 106). See also Noorani (2011: 13–14) and Hingorani (2016: 332–333).
34. Hingorani (2016: 364).
35. Hingorani (2016: 360–374).
36. See, e.g., Cottrell (2013: 173).
37. A brief review of different voices is provided by Hingorani (2016: 332–338).
38. Teng (1990: 100).

11 The State of Jammu and Kashmir and international ramifications

Piotr Balcerowicz

The question of a possible plebiscite as a voice of the people of Princely State of Jammu and Kashmir (PSJ&K) whereby the future status of the territories could be determined divides Indian and Pakistani parties, but even among the Kashmiris themselves the response is not equivocal, though the vast majority, it seems, would subscribe to the demand for a plebiscite. The Pakistani side has consistently reiterated calls to hold a referendum in the territories in accordance with the United Nation (UN) resolutions and has used it as diplomatic 'ammunition' against India, emphasising that it is a precondition to any final solution. India, on the other hand, brushes the idea aside claiming that either such a plebiscite did already take place or that the issue is no longer relevant in the present context. Yet another view is that the idea of a plebiscite could not even arise on legal grounds since the fate of PSJ&K was determined by the monarch as the legitimate ruler of the State through IoAJ&K once for all.[1]

Providing a good exemplification of the latter view, Hingorani (2016: 136) argues that 'should the people of the PIS of J&K ("princely Indian State of Jammu and Kashmir"—P.B.) have had a right to self-determination, the people, through their elected representatives in the Constituent Assembly of the PIS of J&K, reaffirmed the decision of the sovereign ruler to accede to India. Therefore, the question of a plebiscite of further self-determination does not, even otherwise, arise, whether legally or morally'.[2] Such arguments—either purporting that Kashmiris had no legal right to express their voice through a referendum in the then constitutional system or that they did actually exercise their right to self-determination through a referendum once they voted for their representatives to the elected Constituent Assembly, and therefore a referendum legitimately took place—are, however, neither sound nor convincing.

It should be recalled that the accession of PSJ&K was under duress, in unusual circumstances when the ruler controlled approximately two-thirds of the whole territory, with regions under the control of the local population as a result of a popular revolt (e.g. Poonch) or under the Pukhtoon tribesmen.[3] In addition, the Provisional Azad Government in Poonch and Mirpur was formed on 24 October 1947, two days before the accession, all

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of which complicated the legal picture,[4] and the resentment of some of the population of the State towards the autocratic monarch who ruled his state in a manner incompatible with the professed democratic principles underlying the formation of the two newly independent dominions and entailed by the very idea of such a creation cannot be dismissed.[5] In practical terms, any popular revolt or revolution against a central autocratic power formally remains illegal until and unless it succeeds, which instantly legitimises it, and the history of humankind provides ample evidence. Moreover, a regime which is unrepresentative, despotic and authoritarian is usually recognised as illegitimate, with spurious sovereignty, which may justify a revolt against it as a legitimate voice of the people.

The self-determination of a people is universally recognised as an inalienable right, and opinions amounting to claiming that 'the right to self-determination was applicable only to peoples struggling to free themselves from colonial and foreign domination'[6] should be dismissed as anachronistic.[7] The understanding of this right has certainly evolved over time, and prior to World War II and the beginning of the process of dismantling the colonial regimes to conceive of such a right in international legal doctrine was almost unthinkable. Dramatic and tragic events all over the world brought a radical change in its understanding. The right to self-determination, which may entail secession or regime change through a violent process or democratic transformation, has been legitimately exercised over decades not only with respect to former colonies but also in numerous other instances which cannot be classified as 'peoples under colonial regimes', such as the peoples of the former Soviet Union or of the former Socialist Federal Republic of Yugoslavia, fascist Portugal, Francoist Spain, the German Democratic Republic, the Velvet Divorce of the Czech Republic and Slovakia, South Sudan, Northern Ireland etc. No one would argue, except for beneficiaries of the repressive regimes, that the people of North Korea, Chad, Eritrea or Turkmenistan[8] should be deprived of their right to self-determination simply because they do not represent cases of colonial regimes. It should further be remembered that the right to self-determination does not have to entail outright secession of a territory but may involve other legitimate measures such as genuine autonomy and a representative political system. These two modes of self-determination are sometimes termed constitutive self-determination and ongoing self-determination, respectively.[9]

Two principles underlying the UN Charter are well known to have been in conflict from the outset: the right to self-determination and territorial integrity. Both are treated as equally valid, and finding a compromise solution, albeit not always straightforward, is a complex art of counterbalancing their respective values.[10] Even if one assumes that—prior to the milestone UN General Assembly Resolution 1514 of 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966[11]—its mention in

the UN Charter did not create a binding legal norm, it nonetheless constituted an expression of an important political principle which was recognised in the creation of the independent Pakistan and India. This, however, can in no way justify the opinion that '[t]he question of the people of a portion of India, whether it is in Kashmir or in any other state, having a right to self-determination does not, therefore, arise'.[12] Firstly, unlike most (not all) other territories of the Union of India, Kashmir is a special case with its legal status still unresolved and, as a reflection of the situation, no international border exists in that section between India and Pakistan or between India and China, except for the Line of Control and Line of Actual Control, respectively. Secondly, history teaches us that in certain cases, such as Kosovo or South Sudan, even the principle of territorial integrity can be compromised for the sake of the people's right to self-determination. Thirdly, the concept of the 'Indian nation', as with the 'Pakistani nation', related to the two-nation theory, is highly debatable. It is clearly an artificial projection of the contemporary notion of the nation state which, by default, requires the existence of a corresponding nation as a suzerain, the territorial extension of which is the nation state controlling it. Indisputably, national identities can be constructed or transformed.[13] Furthermore, the idea of the Indian nation,[14] just like the idea of 'Hinduism',[15] emerged gradually as part of a political process, beginning with the Bengal Renaissance in the nineteenth century, primarily as a reaction to the presence and dominance of the colonial power, but also as a result of the influence of the idea of the nation state introduced by Western-style education. However, the basic *common* factors which generally unite people around certain values—such as the same language, social institutions and practices, historically bequeathed beliefs, day-to-day living patterns, shared myths and history, ethnic background etc.—were, and still are, in fact quite weak. The focus of the self-identification of extremely diverse ethnic and religious communities gradually emerged first as their imagined shared nationality as Indians, then as two nationalities—Pakistanis and Indians—due to political factors. This sometimes leads to the absurdly entrenched and imagined separate identities of the Western-Punjab Lahoris as Pakistanis and the Eastern-Punjab residents of Amritsar as Indians united with the Tamils or Bengalis under the idea of a common nationhood, even though they do not share the language, customs, cloths, food, religious beliefs and even social stratification (caste) systems (see Balcerowicz–Kuszewska, 2022a: § 14.1).

The simple fact is that Kashmiris[16] do enjoy a palpably distinct national identity based on their distinct history, 'religious mix', food, customs, language, culture etc. which hardly link them to ingredients of the imagined pan-Indian nation, and that distinct identity, coupled with definite aspirations for autonomy, self-determination or independence, has been reinforced through political oppression by the Indian government over the decades.[17] Their right to self-determination can therefore be in no way treated as the case of some tribal people who are merely a negligible portion

of the homogenous India. It is therefore difficult to accept the view that the idea of self-determination was not applicable to the people of Kashmir simply because such a doctrine had not developed into a mandatory norm of international law at that time and could not be applied to Kashmir as *binding law*,[18] or because 'the Indian Independence Act contained no requirement of a plebiscite or referendum prior to, or as ratification of, accession by the ruler of a princely state',[19] inasmuch as precisely that principle was actually applied to India and Pakistan in 1947 as political entities becoming independent of the British rule,[20] and nothing prevented it from being transferred to the residents of PSJ&K as well: the more so as a plebiscite was successfully conducted in Junagadh by Indian government on 20 February 1948, after first the Nawab had acceded to the Dominion of Pakistan on 15 September 1947 and Pakistan had accepted his Instrument of Accession on the subsequent day, whereupon Indian troops had taken over the state early November.

The claim of the groundless nature of a demand for a referendum is sometimes coupled with another, namely that '[t]he government of India never intended to make provisional accession and it always maintained that the accession of Kashmir to India was complete in law and in fact'.[21] Such opinions are based on later historical events and entirely neglect the actual situation between 1946 and 1952.[22] Ample evidence shows that back in 1947 the position of Indian politicians and the Indian government was quite different. Just to give some examples, Jawaharlal Nehru sent a cable to Liaquat Ali Khan on 31 October 1947 informing him that 'Kashmir's accession to India was accepted … on the condition that as soon as the invader has been driven from Kashmir soil, and law and order restored, the people of Kashmir will decide the question. It is open to them to accede to either Dominion then. … Our assurance that we shall … leave the decision about the future of the State to the people of the State is not merely a pledge to your Government, but also to the people of Kashmir and to the world'.[23] Thereafter, he announced on All India Radio on 2 November 1947 that 'the decision must be made by the people of that State. … We have declared that the fate of Kashmir is ultimately to be decided by the people', and cabled to Liaquat Ali Khan on the following day: 'we have no desire to impose our will on Kashmir and leave final decision the people of Kashmir. … we have agreed to an impartial international agency like the United Nations supervising any referendum'.[24] There are numerous speeches and declarations by Indian politicians of the period to the same effect, namely that they declaratively treated the accession as merely a temporary legal measure justifying the expedition of troops to repulse foreign tribesmen and protect the government of the Maharaja.[25]

The idea of some kind of plebiscite was floated some time before by Maharaja Hari Singh who felt compelled to accede to India. As Henry Vincent Hodson (1969: 448–450) records, at an emergency meeting of the Defence Committee of India on 25 October 1947 '[t]he Governor-General

[Mountbatten] suggested as a possible solution that Kashmir might temporarily accede to India, which would come to its aid, subject on the proviso that the will of the people should be ascertained as soon as law and order was generally restored…'. Such reports confirm the claim that Maharaja of PSJ&K had been well aware of such an eventuality. Louis Mountbatten is reported to have informed the prime minister of PSJ&K in a meeting on 10 October that '[w]hatever the future of Kashmir, a plebiscite must be the first step'.[26] Just as IoAJ&K was accompanied by a kind of cover letter by Maharaja Hari Singh, the official countersignature letter accepting it issued by Governor-General (Louis Mountbatten), dated 27 October 1947, was also accompanied by his own letter as a reply to Maharaja, in which Mountbatten expressed the opinion that 'it is my Government's wish that, as soon as law and order have been restored in Kashmir and her soil cleared of the invader, *the question of the State's accession should be settled by a reference to the people* (italics—P.B.)'.[27]

The actual character of and rationale for such a referendum was discussed and approved, as Nehru's cable dated 8 November 1947 to Liaquat Ali Khan reveals: 'there should be the acceptance of the principle, that, where the ruler of a State does not belong to the community to which the majority of his subjects belong, and where the State has not acceded to that Dominion whose major community is same as the State's, the question whether the State has finally acceded to one or other Dominion should be ascertained by reference to the will of the people'.[28] This principle, and even the exact text, went back to Mountbatten's proposal to hold a plebiscite in PSJ&K under UN's supervision, which would set a 'procedure for accession of those States in which this matter is in dispute'. Mountbatten first discussed the idea at a meeting of the Defence Committee of India on 31 October 1947 and thereafter presented it to Jinnah in Lahore on 1 November.[29]

Within the constitutional system of India, the political instrument of a referendum as a means to settle potential conflicts was recognised from the outset in the Indian Independence Act, 1947, as a valid procedure with respect to some territories (e.g. Section 2(2)(c), 3(2)), which could then easily be transferred to solve other territorial disputes.

In addition, all UN Security Council resolutions adopted between 1948 and 1957 (nos. 47, 51, 80, 91, 96, 122, 126)[30] and both UNCIP resolutions of 1948 and 1949, albeit not binding decisions as pursuant to Article 25 of the UN Charter but merely recommendations made under Article 38, as well as the UNSC President's proposal (UNSCP 1949) mention three clear conditions to settle the Kashmir dispute, the antecedent being a precondition for the consequent: the full withdrawal from the State of Jammu and Kashmir of all outside tribesmen and Pakistani troops, the withdrawal of most Indian troops and the *referendum* (*plebiscite*). Incidentally, no attempt has ever been made by either of the sides to meet any of these conditions. The same resolutions emphasise that India and Pakistan, as parties to the process accepting this method of mediation, accepted these conditions,

including a plebiscite. Accordingly, the right to self-determination of the people of J&K was well entrenched in the Indian legal structure, explicitly admitted in the diplomatic exchange between all the parties involved in 1947 and approved by the international community under the UN auspices, of which both India and Pakistan are member states.[31]

Equally problematic is the argument that the people of J&K actually participated in a referendum and approved their State's accession to India the moment they elected the Constituent Assembly in 1951. In his inaugural address to the Jammu and Kashmir Constituent Assembly on 31 October 1951, Maulana Mohammad Saeed, its temporary chairman, claimed that '[t]his Assembly enjoys the confidence of every adult man and woman, and is well equipped with full powers to decide whether Kashmir will accede to India or Pakistan'.[32] Since then numerous experts, primarily Indian, reiterated and elaborated on the view, typified by Veena Vasudeva (2004: 20): 'The Constituent Assembly of Jammu and Kashmir was a representative body, having been formed in 1951 on the basis of adult suffrage. As such, it claimed, and quite justly, to have had the confidence of the people. It embraced all sections of the people and represented all the constituents of the State. It was thus fully competent both legally and morally to determine the future and affiliation of the State of Jammu and Kashmir. The decision it took as the representative body of the people of Jammu and Kashmir was virtually the decision of the people of the State'.

Such an assessment is unfounded. Elections to the Constituent Assembly should by no means be confused with a referendum. As noted previously, in 1950, the General Council of the National Conference passed a resolution calling for the establishment of a Constituent Assembly through elections which would determine 'the future shape and affiliations of the State of Jammu and Kashmir'. Both the wording and spirit were in a direct contravention of previous agreements between all the parties involved and in breach of all UNSC and UNCIP resolutions. In response, on 1 May 1951, came Karan Singh's Proclamation on the Jammu and Kashmir Constituent Assembly setting the rules for its establishment through 'elections … on the basis of adult franchise, that is to say, every person who is a State subject of any class…, is not less than twenty-one years of age on the first day of March, has been a resident in the constituency…, shall be entitled to register in the electoral rolls of that constituency, provided that any person who is of unsound mind or has been so declared by a competent court, shall be disqualified for registration'. Out of the total of 100 seats, 75 were reserved for the deputies from IaJK, 45 of whom came from Kashmir Valley and Ladakh, and 30 from Jammu, with the remaining 25 reserved for the representatives of the PaJK, all of them left vacant. In the controversial elections that took place in September less than 5% of the potential electorate actually voted and, in addition, no women registered as voters: 'In Kashmir and Ladakh, the elections, if they can be so called, were simple. Forty-three candidates were elected unopposed one week before the election date, and two

independent candidates withdrew under pressure later. There was actually no balloting. In Jammu the authorities rejected the nomination papers of the Praja Parishad, the opposition party, in 13 constituencies on the pretext that they were not properly presented …'.[33] As a result the Praja Parishad, a party associated primarily with the Hindus and Sikhs of Jammu, was forced to announce a boycott of the elections and accused the government of 'illegal practices and official interference, wholesale rejections of Parishad nomination papers'.[34] In consequence, with the last contestants already forced to withdraw before the vote, the National Conference and Sheikh Abdullah secured all 75 seats through the extra-electoral measures that were available before the actual polling date.[35] The paradoxical situation of a poll without balloting can hardly be classified as a genuine election to say the least, and certainly cannot qualify as a referendum. What is more, no opportunity was presented to enable the Kashmiris across the ceasefire line (now Line of Control) any participation in the elections. This rigged electoral process was thus most distant from anything we could call a fair and representative ballot and it is no wonder that the UN dismissed it outright as a way to settle the dispute.[36]

Even though Karan Singh as the head of the state was in possession of the full legitimate powers to issue an order to establish a Constituent Assembly, the procedure through which the Assembly was formed was legally flawed in contravening the two central principles on which it rested, namely the idea of free and independent elections and the idea of the representative character of the conclave. Further, despite his and some other Kashmiri politicians' claims to the contrary, the Constituent Assembly could not be lawfully vested with the powers it purported to have, namely with the prerogatives to determine the future of the territories. It could not for two reasons: the first being its improper formation which negated the principles on which it was supposed to be founded, including its non-representative character with the actual exclusion of 95% of the population from IaJK and 100% from PaJK, and the second being that international agreements under UN auspices did not allow for the unilateral formation of a non-representative body which would determine the fate of *all* Kashmiris. The international community involved in attempts to solve the Kashmir dispute, which India and Pakistan had themselves requested, was not an 'extraterrestrial' body: the UN was a platform which was voluntarily joined by both India and Pakistan as member states. As we have seen, reacting to the resolution of the General Council of the All Jammu and Kashmir National Conference of 27 October 1950, the UNSC justifiably 'observ[ed] … that the area from which such a Constituent Assembly would be elected is only a part of the whole territory of Jammu and Kashmir', and 'affirm[ed] that the convening of a Constituent Assembly … and any action that Assembly might attempt to take to determine the future shape and affiliation of the entire State or any part thereof would not constitute a disposition of the State…' (UNSCR 91).

What followed expressed contempt for international attempts to resolve the dispute and for the stance of the impartial legal body. It took shape in a statement of the Chairman of the Assembly made on 31 October 1951 during the inaugural session, with full awareness of the international ramifications of the decision to unilaterally determine the status of the State: 'Kashmir was not interested in the United Nations, which was the victim of international intrigues. The path of Kashmir and the U.N. lay in different directions … It is well known that the National Conference had gone to the people of the State with a programme of accession to India and this programme had been ratified by every single adult voter of the State'.[37] In this context, it becomes irrelevant that the party which monopolised the Constituent Assembly by sidelining any opposition participated in the elections with pro-India slogans and gave the Kashmiris a chance to vote for them. Further, since the Assembly was not vested with legal powers on its own to determine the future of the territories, the act of *ratification* of Kashmir's accession to India that took place on 15 February 1954 should also be considered legally void.

Along the same lines, the following argument is sometimes voiced: 'in order to show its commitment to democratise the state, India tried to ascertain the wishes of the people by way of the Constituent Assembly, which ratified the accession of Kashmir to India on 15 February 1954. Thus, the legality of the accession of Kashmir to the dominion of India cannot be questioned and the accession is complete in law and in fact'.[38] It is conspicuously counterfactual and self-contradictory although it aptly reflects India's intentions and perspective vis-à-vis Kashmir. It is beyond doubt that J&K provisionally accessed to India in 1947 through IoAJ&K with certain clearly stated restrictions and conditions, but whether its ratification in 1954 could only be treated as a reconfirmation of the earlier provisional decision is a different issue. In fact, the act of 1947 was not an unconditional, unrestricted and 'complete' accession in the sense of a full territorial and political merger. Otherwise no Article 370 would be required. In legal terms, as long as Kashmir did not become an unconditionally integral part of India on a par with all other territories, India could not 'ascertain the wishes of the people' of Kashmir because they are not the subjects of the State of India. If two parties A and B enter into any legal agreement, each of the parties has to accede to, or ratify it independently for the agreement to obtain legal validity, and it is impossible that party B (India) does it on behalf of party A (Kashmir) by way of a legal instrument (the Constituent Assembly) supposedly representing party A but fully controlled by party B, unless we call it coercion or unilateralism which impairs the legal autonomy of party A. At least in theory, the Constituent Assembly was expected to be an expression of the wishes of the Kashmiri people, and not an extension of the government of India. In practice, it was all to the contrary, and alongside the Constitution later adopted, it 'stood out as glaring attempts to avoid the pitfalls of a truly democratic exercise of self-determination'.[39]

In the entire process, including the convening of the Constituent Assembly, its 1954 ratification of accession and the drafting of the Constitution, the same legal flaws exist inherited from the afore-described defective process of its formation. The illegal and unrepresentative character of the moves, including the 1954 ratification and the drafting of the constitution, that purported to seal the fate of all the territories was confirmed by the UNSC once more in 1957 through Resolution 122 (*vide supra*). Consequently, the Jammu and Kashmir Constitution, framed and adopted by the Constituent Assembly, has to be regarded as a temporary and provisional measure limited in scope only to IaJK and cannot be regarded as a legitimate universal solution for all the territories of PSJ&K.

In view of the foregoing, two issues should be kept separate: first, the legality of the process of the formation of J&K within the legal framework and, second, the question whether the people of J&K had any right to self-determination or not, for it is absolutely possible to conceive of a process of the formation of the State in a legally impeccable manner. The discussion on the latter question does not therefore have to be directly relevant to the question of determining the legal status of the territories. However, a supposition that the people didn't have such a right to self-determination would violate the basic legal principles on which the international order and UN Charter is grounded and would infringe on one of basic human rights, namely the right to self-determination. It also goes against the principles recognised by the Indian government and politicians in the period between 1946 and 1952 as a backdrop to the creation of both Dominions. Further, to claim that the Kashmiris asserted and effectively exercised their right to self-determination through a referendum back in 1951 when the elections to the Jammu and Kashmir Constituent Assembly took place is legally and factually unwarranted, as we have seen.

An interesting argument is sometimes brought forward, indicating that 'the entire state of J&K, to which the Council resolutions apply, no longer exists; the status quo on both sides of the CFL/LoC has changed considerably since the 1940s'.[40] Consequently, the Kashmiri issue has already been successfully resolved whereupon the Indian-administered region became an integral part of India, whereas the Pakistani-administered section should be reckoned as an integral part of Pakistan. This argument is patently faulty. First, all relevant UNSC and UNCIP resolutions concerning PSJ&K consistently emphasise 'that the future status of the State of Jammu and Kashmir shall be determined in accordance with the will of the people' and were adopted *after* the actual partition of the state, viz. after PSJ&K had ceased to exist. They never applied to the Princely State as a political entity *per se* but to the disputed territories of which it had consisted and their population. In this respect nothing has changed. Second, for the argument to have any trace of validity, also the Pakistani side should be expected to regard the matter as resolved and should have fully integrated the Pakistani-administered territories of Kashmir into the State of Pakistan.

Occasionally, an argument is advanced that none of the UN Security Council resolutions mandated the holding of a referendum in the territories in which the residents would have altogether three options: joining Pakistan, joining India or opting for independence, but instead the choice was only between the accession either to India or to Pakistan.[41] This alternative would effectively preclude any kind of independence granted to either all territories of the former PSJ&K or to their part through a plebiscite under UNSC resolutions, but certainly not under international law. However, it should first be remembered that the UNSC resolutions were formulated in a particular historical context in which the independence of the territories was not seriously debated at the initial stage, and therefore the UNSC did not take any stance on the possibility of independence at that stage (early 1948). The resolutions were clearly a reaction to complaints from respective governments of India and Pakistan, not from any representatives of the Kashmiri population, in 'recogni[tion of] the urgency of the situation' (UNSCR 38) and in order 'to bring about the cessation of the fighting' as soon as possible (UNSCR 47). Such an omission of the independence option would therefore remain with no practical consequence to any future plebiscite in which the independence of Jammu and Kashmir would be decided, because such a third option is an integral part logically comprised by the ideas of self-determination of any nation in general, of the self-determination of the Kashmiri people in particular, and of future determination of the status of the status of the territories. Second, it is just one of seven UNSC resolutions that mentions only the anternative: 'the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite' (UNSCR 47). But even this resolution leaves a third option open, albeit vague formulated, through the statement that leaves the ultimate decision about the future of the State to the people: 'all subjects of the State of Jammu and Kashmir … will be safe and free in in expressing their views and in voting on the question of the accession of the State' (UNSCR 47 1948, § 12). All the remaining resolutions soon after no longer mention the choice between India or Pakistan but speak about the determination of the final status of the territories in general, even with no mention of the term 'accession': 'the determination of its final status disposition [shall be decided—P.B.] in accordance with the will of the people through the democratic method of free and impartial plebiscite' (UNSCR 80); 'the future of the State of Jammu and Kashmir shall be decided through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations' (UNSCR 91); 'the final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations' (UNSCR 122 = 126). Accordingly, UNSC resolutions explicitly include also the option of the full independence of Jammu and Kashmir as an option to be decided through the referendum.

A separate question is how the respective legal systems in the territories of the former PSJ&K currently remaining under Pakistani and Indian administration derive their legality. In practical terms, the legitimacy of the law in a non-dictatorial state can be derived from either of two main scenarios, or developments,[42] and this also resembles the way in which states derive their legitimacy and recognition. Firstly, it is the evolution of the state and its laws, i.e. legal-cum-political continuity, in which legitimacy and validity can be legitimately transferred in a legal manner recognised as legitimate in the existing state of law. In this way, the Russian Federation is recognised a successor state, or 'the continuator state', of the Soviet Union, and retains the rights and obligations of its predecessor, such as a seat as a permanent member of UNSC. The second scenario is that of a revolution within the state and its laws, i.e. the sudden abrogation of the previous legal-cum-political order and the establishment of a new order which does not derive from the past; however, the revolution has to seek legitimacy either by popular acceptance, viz. through a popular vote or referendum through which the ultimate suzerain (the people) accept the new order, or by some other kind of justification (e.g. the purported divine laws). An example of such a new order would be the United States in 1776, or the Taliban-ruled Islamic Emirate of Afghanistan between 1996 and 2001.

Both scenarios are represented in incomplete measure when it comes to the legal systems of the territories of PSJ&K. The legitimacy of PaJK (GB, AJK) represents a case of 'imperfect revolution', in which there in no continuity as regards the legal authorities in GB and AJK, and no actual instrument of accession of these territories to Pakistan has ever been executed through a lawful act. The local, so-called Provisional Azad Government, being 'far from organised, coherent and fully functioning'[43] and established for a short moment in Poonch on 24 October 1947, was neither a legal successor to the ruler of PSJ&K nor gained any recognition[44] as such. It neither derived its legitimacy from any previous administration nor could it bequeath its authority to any future body. Similarly, the succeeding AJK government, unrecognised internationally,[45] did not derive its powers from any predecessor, except that it provisionally used certain laws that were in force as a remnant of the British Raj. Apparently, as Sardar Muhammad Ibrahim Khan, the President of the provisional AJK Government, reports in his autobiographical account, a similar attempt to that of the Maharaja to issue a parallel Instrument of Accession to Pakistan was made, albeit unsuccessfully: 'I had requested the Government of Pakistan most seriously, to give full-fledged recognition to the Azad Jammu and Kashmir Government and accept it as *the* only legal and constitutional authority on behalf of the *people* of Jammu and Kashmir. In that case I proposed to them that the Government of Pakistan should accept the *instrument* of accession from this Government and treat Jammu and Kashmir as a legally and constitutionally acceded State to Pakistan'.[46] This was reportedly rejected by Muhammad Ali Jinnah.[47] Had the offer been accepted by Pakistan, it

would not have provided due legitimacy to the act anyway inasmuch as the provisional government, not recognised by any party (even Pakistan) was not vested with any legal authority of the kind which Hari Singh possessed. Furthermore, the laws, including Rules of Business and the Interim Constitution, binding in AJK and GB, were provided by the federal government and were not drafted by the people of the territories. The legitimacy of authority and the laws was therefore not founded on a legitimate succession of governments or states, but imposed primarily from the outside.

In contradistinction to the 'Azad' region, the legitimacy of IaJK, offers a case of 'imperfect evolution'. The State of Jammu and Kashmir acceded to India through the act of the monarch, and his powers were legitimately passed on to the then barely 18-year-old Crown Prince (Yuvrāj) Karan Singh, who in turn convened the Constituent Assembly in 1951 through the powers which he had lawfully acquired within the legal framework of the state. However, although the succession involved a legal transfer of powers, the whole process was flawed from the point of view of the interests of the people of the state living on both sides of the ceasefire line. The process was nonrepresentative, actualised with the interference of the government of India which imposed its solutions on J&K in a non-democratic, authoritarian manner, in contravention of the constitutional orders of both India and J&K. Consequently, the manner in which the laws and the authority within J&K emerged infringed on the constitutional and legal values which are professed to underlie both legal systems. Even though we can speak of a legal transfer of powers, the interference from the outside made the evolution 'imperfect', or faulty.

Notes

1. For example, Gahlaut (2014: 21–22), Hingorani (2016: 135–139). For a review of the positions on the plebiscite, see Fai (1992).
2. Cf. Vasudeva (2004: 20–24).
3. Snedden (2012: 45), Suharwardy (1983: 110).
4. Schofield (1996: 119–164), Snedden (2012: 37–63).
5. Recall also Jawaharlal Nehru's comments on the 1935 Act already made in April 1936 at the Lucknow meeting of the Indian National Congress, which expressed an almost universal mood among Indian politicians, namely that the people of India 'can never admit the right of Indian States to continue as feudal and autocratic monarchies. They have long survived their day', cited also in Gupta (1966: 36), Jain (1977: 399), Khan (1994: 506).
6. Hingorani (2016: 137).
7. On theoretical and legal aspects of the right self-determination and secession, see Buchanan (2004: 331–400).
8. I.e. countries with the lowest 2016 Democracy Index where there is no war.
9. Anaya (1996: 81), Buchanan (2004: 332–333).
10. Cf. McCorquodale (1994: 885).
11. Cf. Wilson (1988: 75): 'widespread adoption of these Covenants would give the right to self-determination legal force established by treaty'.
12. Hingorani (2016: 137).

13. See, e.g., Anderson (1991), Fearon–Laitin (2000), Balcerowicz (2011).
14. See, e.g., Barot (2002).
15. See, e.g., Lorenzen (1999).
16. A similar creation is also the identity of the Kashmiri nation, see, e.g., Hewitt (2002).
17. See Balcerowicz–Kuszewska (2022a: § 14.2).
18. Farrell (2003: 310), Gahlaut (2014: 24, n. 52).
19. Farrell (2003: 309).
20. Cf. Farrell (2003: 313–314).
21. Gahlaut (2014: 23).
22. Gahlaut (2014: 23), just quoted, refers only to one speech made by Jawaharlal Nehru five years after the partition and a few months before the arrest of Sheikh Abdullah, and quoted in *The Statesman*, 8 August 1952, and then in Diwan (1953: 341–342).
23. Nehru (1996: 296).
24. *White Paper* (1948: 53–55).
25. See Lakhanpal (1965: 311), Howley (1991: 95), Khan (1994: 508–509), Tremblay (1996–1997: 481), Farrell (2003: 308–309).
26. See Sarila (2005: 346), Noorani (2011: 160).
27. Text in: Birdwood (1956: 214), Lamb (1991: 137), Noorani (2011: 122), Webb (2012: 34).
28. *White Paper* (1948: 61–62). See also Hingorani (2016: 140).
29. See Note of a Discussion for Mountbatten by Erskine Crum, 31 October 1947, F200/90C, Mountbatten Papers, Asia, Pacific and Africa Collection (APAC), British Library. Cited also in Das (1971–1974, I: 73–74) and Raghavan (2010: 110).
30. Notably, USSR abstained in all cases. See also Korbel (1954: 255–256).
31. See also Birdwood (1956: 86–114), Lamb (1991: 175–176).
32. JKCAD (1951–1955, I: 4) ('the 31st October, 1951').
33. Korbel (1954: 221–222).
34. Korbel (1954: 222), after *The Times of India* (Bombay), 27 September 1951.
35. Korbel (1954: 220–222), Birdwood (1954: 249–256, 1956: 106–114), Lamb (1991: 190–193), Schofield (2003: 79).
36. Cf. also Khan (1994: 516–519), Farrell (2003: 301–302).
37. Quoted in: Korbel (1954: 222) after *The Hindu* (Madras), 1 November 1951, and in Lamb (1991: 193), though not mentioned in the minutes in JKCAD.
38. Gahlaut (2014: 23–24).
39. Farrell (2003: 312–313).
40. Roy-Chaudhury (2008: 343).
41. Hashim (2021).
42. I abstract this issue away from the questions about the sources of law as presented in Hart-Dworkin debate, natural law, legal realism, legal positivism, interpretivism etc., Murphy–Coleman (1990: 6–66).
43. Snedden (2015: 168).
44. Snedden (2012: 45, 153), Snedden (2015: 168–169).
45. UNCIP (1948): '3. There shall be no recognition of the so-called Azad (Free) Kashmir Government'.
46. Khan (1990: 129).
47. See Behera (2006: 172), Alam–Bali (2012: 45).

12 The 2019 debacle

Piotr Balcerowicz

As complex and problematic legal constitutional relation between J&K and India as it already was came to an abrupt end. The legal temblor which the events of August 2019 brought dramatically and somewhat unexpectedly pushed the question of IaJK and its legal status into a completely new dimension. Three documents that jointly abrogated the special status of J&K and its autonomy are (1) Presidential Order C.O. 272: the Constitution (Application to Jammu and Kashmir) Order, 2019 (CAJKO 2019), issued by the President of India on 5 August 2019; (2) Presidential Order C.O. 273: Declaration Under Article 370(3) of the Constitution (CO 273), issued on 6 August 2019; and (3) the Jammu and Kashmir Reorganisation Act (JKRA), 2019, passed by the Lok Sabha the same day, and (unsurprisingly) assented to by the President on 9 August 2019, whereas the territorial consequences of the latter decision came into effect on 31 October 2019.

The first of these documents, a very short Presidential Order (CAJKO 2019), supersedes an earlier Presidential Order (CAJKO 1954), which had introduced Article 35A to the Constitution of India (CI). The order of 14 May 1954, and its presidential amendment order (CAJKAO 1956) of 11 February 1956 to bring the CI in line with the Constitution of J&K in respect to wording, reconfirmed the status of Kashmiri state subjects, from then on known as 'permanent residents', as the only legitimate residents of J&K and as exclusively entitled to settlement in the state, to state employment and scholarships etc., to acquiring immovable property and purchasing land. It was also one of important preconditions for the validity of the J&K Constitution, which came into force a few months later, on 22 December 1956. With the abrogation of Article 370 on 5 August and, thereby, of the J&K Constitution, also the status of 'permanent residents' of J&K, i.e. the State Subjects, retained in the J&K Constitution (Artt. 6–10), was ultimately revoked. A legal remnant of the idea, in the form of the Jammu and Kashmir Permanent Residents Certificate (Procedure) Act of 1963, was subsequently abrogated through JKRA (Fifth Schedule, Table 3, 101) on 9 August 2019, and this opened J&K to outsiders to settle and to purchase land and property there. Thereafter, two 2020 notifications of the Ministry for Home Affairs (JKRA 2020-1, § 14; JKRA 2020-2, § 1),[1] in a

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procedure analogous to Pakistan's Ministry of Kashmir Affairs and Gilgit Baltistan (MoKGB), granted domicile rights for Indian citizens and substituted the terms 'permanent residents' with 'domiciles of UT of J&K'. Within approximately a month (through JKGDCPR of 18 May 2020), already more than 25,000 people with no former State Subject status who had applied via the J&K Government website[2] were issued permanent resident certificates (PRC)[3] in a speedy procedure, and thereby acquired all the rights of Kashmiris. Through this procedure, 6000 retired soldiers and officers from the Gorkha community who had served in J&K also became permanent residents overnight in the region where they had been at loggerheads with the genuine Kashmiri residents who treat them as occupiers.[4]

The succinct CAJKO 2019 consists of two articles. Article 2 regulates that the CI directly applies to the State of Jammu and Kashmir, and that the Governor of Jammu and Kashmir, formerly known as the Sadar-i-Riyasat, 'act[s] on the advice of his Council of Ministers', i.e. functions as an administrative extension of Delhi government. The order is also expected to accomplish a 'legal trick' of converting the crucial (and non-existent since 1956) Constituent Assembly of the State into Legislative Assembly of the State, which still until 5 August 2019 formally remained the legislative wing of the J&K, there being no other Legislative Assembly in J&K. The Constituent Assembly was referred to in Article 370(2) of CI, and its aim was to draft the Constitution of Jammu and Kashmir (CJ&K). It was active between 31 October 1951 and 17 November 1956, when it was dissolved after the promulgation of the Constitution, whereupon Article 370 became permanent and irreversible, inasmuch as its cessation would necessarily require a recommendation of the said Constituent Assembly, no longer in existence after that date. In other words, from 5 August 2019 onwards, the provisions of the J&K Constitution no longer hold, and all institutions mentioned in it no longer exist, except for the office of 'the Sadar-i-Riyasat', now renamed 'the Governor', and the very next day re-renamed 'Lieutenant Governor' through JKRA. Accordingly, an institution required for the revocation of Article 370, namely the Constituent Assembly, which was legally and formally completely separated from the Constituent Assembly of J&K, is reanimated through the presidential order in a new *avatāra* form of, and equated with the latter, the Legislative Assembly. The legal death of Constituent Assembly in 1956 was the main judicial obstacle to abrogate Article 370 and to revoke the autonomy of Kashmir. Precisely this was an additional aim of CAJKO 2019—to circumvent the legal stalemate: Article 370 can no longer be abrogated, because the institution whose recommendation is required for that purpose was dissolved once and for all in 1956. This is therefore the nature of the 'legal trick': to resurrect the institution to perform the required task.

The move seems legally problematic, first, because both institutions—the Constituent Assembly and the Legislative Assembly—were of different composition, being formed and elected in different ways, and served

different purposes, which makes their equation outright impossible. Second, even with the Legislative Assembly accepted as an *avatāra* of the resuscitated Constituent Assembly, the move would require that the Legislative Assembly, in whichever form, convene and recommend the abrogation of Article 370. However, this could logically no longer happen under the circumstances that the Legislative Assembly, expected to recommend the abrogation of Article 370, formally ceased to exist on 5 August 2019 with this very presidential order (CAJKO 2019), and therefore, as a no longer existent body, could not debate on matters pertinent to the J&K Constitution and to the legal status of J&K and, in particular, provide its recommendation to the President to abrogate Article 370. The other document, JKRA of 9 August 2019, did bring to life a new Legislative Assembly of union territory of Jammu and Kashmir (UTJ&K), but the Presidential Order (CAJKO 2019) of 5 August could not meaningfully refer to a future entity, which was legally non-existent at the time of its promulgation. Further, before the revocation of Article 370, the President did not seek and could not possibly have sought the recommendation (acceptance) of Legislative Assembly, equated with Constituent Assembly on 5 August 2019, because before that date Legislative Assembly had not been renamed as 'Constituent Assembly' yet, and because the actual Legislative Assembly to be so renamed was dissolved in November 2018, and since that time J&K remained under direct rule of the governor appointed by the President of India, effectively with no Legislative Assembly.

CAJKO 2019 presents a legal paradox and is a logically inconsistent and self-nullifying act. An attempt to resolve the felt paradox was made on the next day with the JKRA, § 14(2), which intends to eliminate the legal *vacuum*, albeit unsuccessfully (*vide infra*). Its opening line states that 'the President, with the concurrence of the Government of State of Jammu and Kashmir, is pleased to make' this order. Here, 'the Government of State of Jammu and Kashmir' is actually the Governor, as 'Sadar-i-Riyasat' was so renamed in 1965, appointed by the President. Consequently, the order is presented solely by the President, with the required recommendation of the Constituent Assembly swept aside.

This emendation of the Indian Constitution is formally an insert, as Clause 4, into Article 367 (with additional miscellaneous guidelines concerning the application of the Constitution) after Clause 3, which defines what a 'foreign State' is. In itself, this appears an act of considerable symbolic significance inasmuch as Clause 4, in contrast to Clause 3, takes the territory of Jammu and Kashmir as an *integral* part of India, with no attributes of a foreign political entity that could endow it with the slightest title to a minimal autonomy.

One of other problematic issues concerning CAJKO 2019 is the manner it was introduced. The order (Art. 1) 'shall come into force at once', viz. with no *vacatio legis*, and was meant to take everybody by surprise. And it did. The way it was promulgated, considering its gravity and ramifications,

questions the sober foundations of Indian constitutionalism, where transparency and time to reflect and prepare for new arrangements are necessary requisites. It came with a rather unusual speed which allowed for no time for preparation and is normally encountered only in cases of a state of emergency, martial law etc. At the time of the promulgation of this law, there was nothing that would warrant the haste. However, the precedent was the Presidential Order of 1954 which also came into force at once.

Presidential Order C.O. 273 (CO 273) of 6 August 2019 complements CAJKO 2019. It provides a completely new reading to Article 370[5] through which all articles of the Indian Constitution with no exception are directly applied to J&K, as they would to any other part of Indian territory.

Both in temporal and logical senses, CAJKO 2019 had to precede the other law, the JKRA, 2019, which required it for its legal validity and applicability. The latter was submitted before the Lok Sabha by Amit Shah, the Minister of Home Affairs and the hard-line president of BJP, on 6 August and came in force on 9 August 2019, after the President's assent and after the Indian Government had banned all assembly in Kashmir by imposing Section 144 (the same as in Pakistan, a remnant of the colonial times) on 4 August, placed Kashmiri political leaders under house arrest, introduced a virtual 24-hour curfew and suspended all communication lines, including Internet and phone connections. JKRA is quite lengthy, consists of 103 articles and five schedules. Unlike in the case of CAJKO 2019, there was a *vacatio legis* and it came into effect on 31 October 2019.

The result is a fractured J&K, for the law splits the state into two separate union territories (Jammu and Kashmir and Ladakh). Its Fifth Schedule provides: a list of 106 'central laws made applicable to the union territory of Jammu and Kashmir; and union territory of Ladakh' (Table 1), 7 'state laws which shall be applicable to the union territory of Jammu and Kashmir and union territory of Ladakh with amendments' (Table 2), 164 'state laws including governor's acts which are repealed in union territory of Jammu and Kashmir; and union territory of Ladakh' (Table 3) and 166 'state acts including governor's acts that shall remain in force in union territory of Jammu and Kashmir; and union territory of Ladakh' (Table 4). The important lists either annul or enact respective laws with regards to J&K. None of them mentions the Constitution of Jammu and Kashmir, which confirms that the presidential order (CAJKO 2019) rendered it infructuous from 5 August, and thus non-existent at the time of the promulgation of JKRA.

Both union territories have no autonomy and remain under direct rule of the President of India. The (joint) administrator of both UTJ&K and UTL is from then on called 'Lieutenant Governor' (JKRA § 14(1) and 58(4) respectively), appointed by the Indian president (JKRA Art. 2(h), and CI Art. 239), and the office replaces what used to be the head of the state of J&K. UTJ&K assumes the legal status similar to that of the union territory of Puducherry (JKRA § 13, and CI Art. 239A), whereas UTL is downgraded

to the territory completely dependent on presidential powers, similar to the Andaman and Nicobar Islands, Lakshadweep etc. (CI Art. 240).

Article 14 brings a new 'Legislative Assembly' into existence, which can by no means be assumed to be a legal continuator of the previous Legislative Assembly of J&K. Through Articles 17, 18, 27, 36, 38–40, 55, but also through 15, 19, 23, 41, 4–46 etc., the Legislative Assembly, applicable only to UTJ&K, becomes a fully fictitious representative body, completely controlled by the President of India and Lieutenant Governor. No analogous legislative assembly is envisaged in the case of UTL (Art. 3: 'Ladakh without Legislature'). Through Article 32(2), practically all legislative powers remain directly within the prerogatives of the Parliament of India, with no intervening buffer of the now defunct CJ&K. Through Article 53, the Council of Ministers, consisting a selected group of the members of the Legislative Assembly, is reduced to mere advisory role to Lieutenant Governor. The law offers not even an apparel of autonomy and self-governance for the whole region.

Instead, it fully integrates the former State of J&K with India, now downgraded below the status of a full-fledged state of India, and links it directly with the political and administrative centre in New Delhi. Both union territories are now governed directly from New Delhi via the Department of Jammu, Kashmir and Ladakh Affairs (SR1) of the Ministry of Home Affairs (DJKLA). They formally comprise Kashmir Valley (population: 6,888,475), Jammu Region (population: 5,378,538) and Ladakh Region (population: 274,289). Within the prerogative of the department is the administration of the territories, which officially 'includ[es] terrorism/militancy', and thereby civilian control is combined with military and security operations. Its name, purpose and structure resemble that of Pakistani MoKGB, the main difference being that Pakistan deals with the affairs of the territories it administers through a separate ministry, whereas India does the same via just a department within a ministry, which may be treated as a symbolic gesture downgrading the status of Kashmir.

Further, through Article 16, following the abrogation of State Subjecthood through CAJKO 2019, any citizen of India may, from 31 October 2019, become not only a resident of IaJK but also be a representative and administration officer as a member of the Legislative Assembly. Accordingly, an unhindered influx of the outsider population to India-administered Kashmir from all over India is now legally accommodated, and the process of gradual demographic dilution of indigenous Kashmir population in the future is safeguarded, similar to what has happened to the Mongols in Inner Mongolia of China (Mongols reduced from the vast majority in the early 1920s to now 15%, Han 80%) and to the Uighurs in China-occupied Eastern Turkestan (Xinjiang), now a minority in their province (Uighurs from over 75% in 1949 down to 46% now; the Han from 7% in 1947 up to 44%), and to Tibetans being now a minority in Tibet (historically consisting of Ü-Tsang (*dbus gtsang*), Kham (*khams*) and Amdo (*a mdo*)), now split

into Chinese provinces of the Tibet Autonomous Region, Qinghai, Gansu, Sichuan and Yunnan. In all these territories, after a few decades of Chinese rule, the indigenous peoples, previously being ethnolinguistic majorities in their lands, have been diminished to merely a fraction of the present populations of respective regions. This plainly demonstrates that the process of demographic and cultural dilution can progress relatively quickly and take a generation or two, given good communication, transport connections and economic incentives to the outsiders.

The 1956 CJ&K had oaths of offices (Art. 31 etc.) in which a respective office holder was expected to swear to 'protect and defend the Constitution [of J&K—P.B.] and the law and … [to] devote [one]self to the service and well-being of the people of the State [of J&K—P.B.]'. These provisions are no longer in place. Instead, the Fourth Schedule of JKRA prescribes forms of oaths to be taken by candidates and members of the Legislative Assembly and of the Council of Ministers, etc., of UTJ&K, in which they swear to 'bear true faith and allegiance to the Constitution of India' and to 'uphold the sovereignty and integrity of India', in which for the first time they strikingly resemble loyalty clauses of PaJK.

Conspicuously, both laws, CAJKO 2019 and JKRA, intend to indicate that there is no trace left of Kashmir's earlier autonomous status or of Kashmir's territorial ambiguity: both 'union territories' are treated as India's own. In addition, JKRA reiterates India's claims to the territories administered by Pakistan[6] and reserves 24 vacant seats in the Legislative Assembly for the population of PaJK (§ 14(4)(a)) as a symbolic gesture. The adoption of new laws occurred with no prior knowledge of the population concerned and no consultations, who clearly had not consented to such solutions. On the contrary, this makes the legislative process, apart from its unconstitutional nature, a travesty of democracy, unthinkable in any democratic country. The act and process of the dismantling of J&K autonomy in 2019 is somewhat comparable to what China accomplished with the autonomy of Hong Kong in 2019–2020 or to the plans announced by Benjamin Netanyahu early 2020 to incorporate chunks of Palestinian territories into the Israeli state.

The abrogation of Article 370 and Kashmiri autonomy was a materialisation of BJP's earlier intentions publicly floated in the early 1990s[7] and a fulfilment of BJP's promises announced in their 2019 election manifesto. The plans to revoke Article 370 and first legal steps in this direction were formally announced in a press release (GoI 2019-02-28) after the Union Cabinet session on 28 February 2019, which approved the Constitution (Application to Jammu & Kashmir) Amendment Order, 2019 (CAJKO 2019) and announced changes concerning Article 370.

In their criticism of the special status of Kashmir, BJP raised an issue of alleged unconstitutionality of Article 35A and the manner it had been introduced into the Constitution (CI), namely via a presidential order (CAJKO 1954, and amended CAJKAO 1956), not through normal legislative process.[8] However, the powers to introduce such an article were already there

in the Constitution from the very outset, namely in Article 370(1) in consonance with the Instrument of Accession. The legality and constitutionality of Article 35A, being a legitimate modification made under the scope of Article 370(1), was confirmed by the Supreme Court of India in their judgement of 30 March 1961 in the case *Puranlal Lakhanpals versus President of India and others* (SCI 1961-03-30). In a separate case of *State Bank of India vs Santosh Gupta and Anr. etc. on 16 December, 2016* (SCI 2016-12-16), the appellate Supreme Court of India further notified that the provisions of Article 35A 'cannot be challenged on the ground that it is inconsistent with the fundamental rights chapter of the Indian Constitution' (a semi-quote of Art. 35A), and they are 'not the subject matter of challenge on the ground that it violates any fundamental right of the Constitution of India'. It should also be noted that, as the Supreme Court pointed out, the irrevocable character of this article relies on Article 370: as long as the latter applies, the former has to apply.

Advocates of the abrogation of Kashmir's autonomous status then questioned the legitimacy of Article 370 due to its temporary character.[9] Indeed, it is found in the Constitution's 'Part XXI.—Temporary and Transitional Provisions', under a marginal note 'Temporary provisions with respect to the State of Jammu and Kashmir'. However, first, the temporary character of any law does not *per se* invalidate it. In fact, almost *all* constitutional laws have temporary character in a certain sense, viz. till the constitutional majority decides to amend them. The question of being 'temporary' in the case of Article 370 is a matter of the label (the marginal note beside Article 370), but it does not concern its actual *contents*, inasmuch as Article 370 (or any other of the CI) does not specify any temporary provision limited in point of time for it, as, for instance, in the case of Article 369, and therefore it remains binding until revoked. Second, the courts in India have consistently upheld the validity of the provisions of Article 370 and its irrevocable status. In their 2015 judgement (J&KHC 2015-10-09), Jammu & Kashmir High Court rules 'that Article 370 though titled as "Temporary Provision" and included in Para XXI titled "Temporary, Transitional and Special Provisions" has assumed place of permanence in the Constitution. It is beyond amendment, repeal or abrogation, inasmuch as Constituent Assembly of the State before its dissolution did not recommend its amendment or repeal'. The Supreme Court of India consistently argued in the same spirit on a number of occasions for six decades.[10] In its several judgements, the Supreme Court has confirmed the legality of the actual mechanism to abrogate Article 370: since the institution required for the abrogation of Article 370, i.e. the Legislative Assembly, is no longer—and can no longer be—in existence, the mechanism meant to abrogate it can no longer be applied. As the Supreme Court (SCI 2016-12-16) explained, referring to an earlier ruling (SCI 1968-10-10), 'Court clearly held that though the marginal note refers to Article 370 as only a temporary provision, it is in fact in current usage and *will continue to be in force until the specified event in sub-clause (3) of the said Article takes place*

(italics—P.B.)'. As a result, the article has effectively acquired a permanent status. However, its permanent status is of a different kind than most other articles of the Constitution. It is in this very special sense that Article 370 enjoys the status of *peculiar permanency*, unlike most of the remaining articles of Indian Constitution: in their case, the mechanism to amend or revoke them is mostly straightforward: they can be revoked, superseded or modified as long as there is a required constitutional majority in the Lok Sabha, or a similar mechanism. But the mechanism to revoke, supersede or modify Article 370 can no longer be applied in the absence of the required institution.

The temporality of Article 370 was cited as an argument against its validity in the case *Kumari Vijayalakshmi Jha vs Union Of India* of 2017 (DHC 2017-04-11). The petitioner argued that the temporary provisions of Article 370 had 'lapsed with the dissolution of the Jammu and Kashmir Constituent Assembly', and therefore 'the Constitution of Jammu and Kashmir'—which hinges on this Article—'is void, inoperative and *ultra vires* the Constitution'. The Delhi High Court rejected this argumentation on the grounds that 'as per the judgement of the Supreme Court, though as per marginal note Article 370 is a temporary provision, it will, however, continue to remain in force until the specified event in clause 370 of the Article takes place'. This judgement was subsequently upheld by the Supreme Court of India on 3 April 2018, with the bench of Justices Adarsh K. Goel and Rohinton Fali Nariman, who referred to their earlier ruling: 'The issue concerned is covered by the judgement of this court in the 2017 SARFAESI matter,[11] where we have held that despite the headnote of Article 370, *it is not a temporary provision* (italics—P.B.).'[12]

In the light of the above, the abrogation of Article 370, and thereby of Article 35A, alongside the J&K Constitution and the revocation of the autonomous status of the State of Jammu and Kashmir, has to be considered an unconstitutional act:

- in which the proper mechanism of the abrogation Article 370 as envisaged in the CI was *not* applied;
- which contravened expressly stated judgements of the Supreme Court of India, consistent in its rulings in this matter for the last six decades.

Therefore, all three laws, CAJKO 2019, CO 273 and JKRA, have to be concluded as nil and void, inoperative and *ultra vires* the CI. Ergo, Articles 370 and 35A as well as the J&K Constitution should be considered as still in force after August 2019. As a consequence, *all* successive administrative steps undertaken by the Government of India, including the split of J&K into two union territories, have to be considered as having no legal basis, and the manner in which India administers J&K now is, from 5 August 2019 onwards, unconstitutional and illegal.[13]

In their letter, the three laws decidedly and for the first time intended to remove any remnants of uncertainty as regards the legal status of

all the territories of the former PSJ&K: India views them as its own legitimate lands, and any issue concerning all Kashmiri territories is India's own internal matter except for PaJK, considered to be under Pakistani occupation. Accordingly, there is no scope for international involvement from Indian perspective. However, as we have seen, there is little room to accept such a reading. Despite such attempts, but also by virtue of them, *the legal status of Kashmir remains ambiguous, unresolved and inconclusive*. And therefore, it should still be considered an international issue, not an internal matter of India or bilateral issue between Pakistan and India.

No other rationale put forward by BJP politicians and the Indian Government in support of scrapping the autonomy of Kashmir, even if sound for whatever reasons, is legally relevant to the slightest degree, for even a well-argued case has first to be constitutionally legitimate to become a binding law. These justifications include the following spheres[14]:

- Economy: autonomy of J&K 'is still an impediment in restricting private or global investment into the state' and has a negative impact on the development of Kashmir; without autonomy 'the state will prosper economically and socially'.
- Employment: abrogation of the autonomy will provide more jobs, especially to young people.
- Tourism: without autonomy, 'Kashmir could be one of the top tourist destination'.
- Education: due to 'permanent residency', public colleges, including medical colleges, cannot adequately fulfil vacancies and 'professors cannot be hired from outside the State'.
- De-radicalisation: abrogation of the autonomy will improve economic conditions and employment opportunities and thus reduce radicalisation and militancy in the state.
- Gender equality: Article 370 allows for biased treatment of women, for instance, Kashmiri women 'can't pass on their state subject rights to their children and non-permanent resident spouses'.
- Religious law: *sharīʿah* 'is applicable to women in Kashmir'.
- Constitution as 'a living document': 'Article 370, via orders, has been modified so many times, it can be expelled from the Constitution as well without taking "concurrence" of the now-defunct Constituent Assembly'.
- Social equality and protection of the vulnerable: some tribal, ethic or caste groups who migrated to J&K after 1956 and settled there do not enjoy the same rights, including the access to scholarships, education and state employment or purchase of land, as permanent residents.
- Respect for Indian military: non-Kashmiri soldiers operate in J&K, defending their land, but are not given due respect and cannot settle there.

- Prevention of Pakistan's influence: revocation of the autonomy of J&K would remove opportunities for Pakistan to interfere in Kashmiri and Indian issues.
- Stability: autonomous J&K brings instability to India and demonstrates to the whole world that India is unable to fully integrate the State into the Union.

All these arguments are strictly of extrajudicial, non-legal nature, with no relevance to the question whether the repeal of Article 370 and J&K autonomy is legal or not. In addition, all of them are *faulty* and in most cases, one can successfully argue to the contrary. The abrogation of Kashmiri autonomy in August 2019 has already had a destructive impact on Kashmiri economy, employment, tourism, stability etc., and there is no evidence that it will ever tilt to the positive side to a greater degree than in the case of the autonomous Kashmir. In addition, most civil and family matters for *all* Indian Muslims are regulated according to Muslim Personal Law (Shariat) Application Act, 1937, the Dissolution of Muslim Marriages Act, 1939, etc., and J&K is not an exception in this respect. A number of changes in the laws of Kashmir have been observable in recent years to solve certain social or gender issues, and improvement in these spheres is also possible within the autonomous Kashmir. However, a detailed analysis of all these extralegal arguments is beyond the scope of this book.

The main justification which India in reality provides is its unconstitutional policy of *faits accomplis*, and all sides involved are expected to accept the solutions illegally and one-sidedly imposed by India. The latest phase of the process of the dismemberment of IaJK was accomplished swiftly, within the span of five days: through the presidential orders (CAJKO 2019; CO 273) of 5 and 6 August 2019, the special status of J&K was dismantled, Article 370 was nullified, the J&K Constitution was repealed, and all provisions of the CI were applied to IaJK directly; through JKRA, union territories of Jammu and Kashmir (with legislature) and Ladakh (without legislature) were created, and thereby also the protections of the Kashmiris as state subjects and of their lands under State Subject Rule (SSDN) were lifted. However, what the government of Narendra Modi unconstitutionally accomplished in August 2019 was merely a replication of what the government of Pakistan had effectively done long before in Gilgit-Baltistan (previously known as Gilgit Agency and then as Northern Areas) as early as 1947. To some degree, a forerunner of these drastic laws that allow for serious demographic changes, acquisition of the immovable property by outsiders and the exploitation of the lands was The Gilgit-Baltistan Governance Reforms, 2019 (GBGR 2019; see Chapter 7). Both in GB and in IaJK, the State Subject-hood no longer exists and the lands and immovable property are up for sale and grab to the outsiders.

The foregoing overview of the legal status of the territories of PSJ&K, in its complexity, does not bring about any new discovery and can be summarised in a nutshell. Despite the claims of both administering parties, all Kashmiri territories and their populations are deliberately kept in a state of legal limbo, and the status of each of the two wings is contested by India and Pakistan on various grounds. The 'yet-to-be-determined' status PaJK is not acknowledged by Pakistan in the true sense, and it treats them effectively as its own territories, and India has not respected the legal consequences of Kashmir's accession to the Union, which was both provisional and temporary. The policy of *faits accomplis* which India pursues has not resolved the legal status of the territories of the former PSJ&K to the slightest degree, rather it has complicated the issue even further.

In their own rather different ways, India and Pakistan have been imposing their political visions and legal solutions on the territorial chunks of the Kashmir State they control disregarding the will of the people, and treating them rather like exploitable and mute colonies, deprived of the right to self-determination. All local attempts at political autonomy, self-rule and a free hand to make their own laws in their own land have been consistently thwarted by either New Delhi or Islamabad, which have instead exercised their rule through legal mechanisms that purport to be locally adopted but are in fact enforced either explicitly, e.g. AJKIC (1974), GBESGO (2009), GBGR (2019) 'generously' granted to the people by the Pakistani government without them ever being genuinely consulted, or in a semi-disguised manner such as dozens of Indian presidential orders and unconstitutional amendments to CJ&K, the boundless overstretching of semantic boundaries of Article 370, the letter of which has become empty, and finally the dismantling of J&K autonomy in 2019. Despite such attempts, but also by virtue of them, the legal status of all the territories of PSJ&K remains ambiguous, inconclusive and unresolved.

The unresolved and disputed status of the territories is additionally recognised by China through its 1963 Boundary Agreement with Pakistan,[15] through which China renounced all its claims to suzerainty over the State of Hunza in GB, practically irrespective of whether it be Pakistan or India to govern there. Even though its arrangements have not been recognised by India, the Agreement refers to 'the contiguous areas the defence of which is under the *actual control* (italics—P.B.) of Pakistan' (BAChP, Preamble) and to a future 'settlement of the Kashmir dispute between Pakistan and India' (BAChP, Art. 6), in line with UNCIP and UNSC resolutions.

Back in 1948 and 1949, both India and Pakistan willingly agreed to accept UN mediation as a principle of resolving the conflict and unconditionally acceded to the terms and conditions required for the determination of the future of Kashmir as specified in UNCIP and UNSC resolutions. Thereby, both sides of the dispute accepted the unresolved and legally undetermined

status of *all* the territories of PSJ&K. Through the Simla Agreement (SA 1972, 1.2) both sides also accepted the principle, unilaterally undermined by India in August 2019, 'to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them. Pending the *final* settlement of any of the problems between the two countries, neither side shall *unilaterally alter the situation* and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relation'. Nothing has changed in legal terms ever since as regards the bare fact that the future of all the territories of the former Princely State remains to be determined in accordance with the freely expressed will of the inhabitants living on both sides of LoC, which is one of their basic human rights. Both parties should also recall an important principle: *pacta sunt servanda*. The dispute continues to remain of international character. However, above the Kashmiris' heads, both hostile parties are interested in the indeterminateness and vagueness from which they effectively profit either internally, to justify their political sway, military power and economic domination, or externally, in relations with the neighbours, while using the Kashmiri case as a pawn in the political game. The price paid for this state of affairs is heavy—massive and manifold violations of human rights in all the territories—and is paid predominantly by the residents, deprived of their full civil rights which they should and could enjoy as true citizens of either Pakistan or India once their genuine citizenship status is recognised.

Notes

1. With JKRA (2020-1), Sect. 10 of b 1978 was repealed that prohibited J&K residents to be detained in jails outside of J&K, and now the transfer of Kashmiri detainees outside of IaJK is possible.
2. www.jk.gov.in/jammukashmir
3. Ahmad (2020).
4. FPK (2020).
5. '370. All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise'.
6. JKRA § 14(1): 'until the area of the Union territory of Jammu and Kashmir under the occupation of Pakistan ceases to be so occupied'.
7. See Balcerowicz–Kuszewska (2022a: § 18.1).
8. *The Hindu* (2019-08-05).
9. *The Hindu* (2019-08-05).
10. For example, SCI (1959-03-02); SCI (1968-10-10); SCI (2016-12-16).

11. This is the case *State Bank of India vs Santosh Gupta* (SCI 2016-12-16), in which the bench resolved that 'despite the fact that it is, therefore, stated to be temporary in nature, sub-clause (3) of Article 370 makes it clear that this Article shall cease to be operative only from such date as the President may by public notification declare. And this cannot be done under the proviso to Article 370 (3) unless there is a recommendation of the Constituent Assembly of the State so to do'.
12. BS (2018-04-04), the full text of the ruling has not yet been published in Indian Kanoon (as of 12.2019).
13. See also Soofi *et al.* (2019).
14. *The Hindu* (2019-08-05).
15. For an analysis of the agreement, see Lamb (1964).

Part III

The prospects for solving the conflict with protection of human rights in Kashmir

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13 Introduction

Decoding the Indo-Pakistani conflict

Agnieszka Kuszewska

Each intractable, long-lasting international conflict has its unique specificity which pertains to numerous exogenous and endogenous factors: irreconcilable grievances, projected as key security dilemmas, the interests and engagement of external powers with geostrategically motivated alliances, the policies of the adversaries vis-à-vis the disputed areas and local enmities. The ongoing Indo-Pakistani discord is frequently termed as historically inherited enduring rivalry between the opponents which had competing vision of state construction at the time of Indian subcontinent partition,[1] a dispute prone to escalate to militarised confrontation, characterised by 'persistent, fundamental, and long-term incompatibility of goals'.[2] The disputed region remains a source of perpetuated antagonism, intentionally buttressed by state-controlled rhetoric, infested by populist, nationalist parlance, and fueled by politically constructed religious supremacy,[3] which is viewed as key component of official state ideologies, narrowly defined, propagated as 'national interest' and solidly incorporated into domestic and foreign policies. The mechanisms and rhetoric underpinning such permanent hostility are fostered by respective establishments to remain an inseparable part of people's consciousness, which intentionally disables common person's skill to differentiate between the facts and conspiracy theories/propaganda. Decoding the correlation between how both states ideologically construct and validate their foreign and domestic narratives, and the actual multi-layered, dismal results of persistent belligerence, is a key prerequisite for understanding the current and future dynamics of the Indo-Pakistani conflict. Such analysis enables to offer potentially constructive resolution proposals.

Pakistan's functioning as an ideological state with religious majoritarianism since its inception, with incessant obsession vis-à-vis Indian-controlled Kashmir, and India's gradual political transformation into a state with one state-one religion paradigm, result in bolstering mutually exclusive belligerent narratives. The state-controlled stance vis-à-vis Kashmir and negative depiction of the neighbouring rival are incorporated into education systems, which disregard or distort historical truths, and disseminated by pro-establishment media, analysts, etc. The purpose is to mould strategic environment of competing nationalisms, conducive to escalate tensions and mobilise

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radical segments of respective societies rather than develop the ability to compromise and cooperate. Following the 14 February 2019 suicide attack against Indian Central Reserved Police Force (CRPF) in Pulwama district of IaJK by notorious Pakistani-based Islamist group, Jaish-e-Mohammed, and the abrogation of semi-autonomy of Indian-administered Jammu and Kashmir by New Delhi on 5 August that year, mutual tensions sharply re-escalated. The former event evoked recurrent accusations of sponsoring terrorism and LoC infiltration by the militants (India against Pakistan), the latter - of massive violations of Kashmiris' rights (Pakistan against India). The tussle further limited any chances for breaking the impasse between the two adversaries; coming up with a negotiated settlement in the near future seems a political fantasy. Nonetheless, due to multidimensional destructiveness of this conflict, there is a continuous necessity to examine potential resolution scenarios, to pursue attempts aimed at tackling the issue of Kashmir and settling Indo-Pakistani relations.

Contemporary dynamics in the disputed region is besieged with politicised communalism, institutionalised, selective disenfranchisement and systematic disregard for the rights of its inhabitants. From the onset of its relatively short existence as a political entity formed in the mid-19th century, the former Princely State of Jammu and Kashmir (PSJ&K) was handled as a bargain and prize in regional power rivalry. First, it was forcefully integrated, with disdain to its historical and cultural heterogeneity, and ceded to the autocratic rule of Dogra regime with British paramountcy, then after 1947, fought over by the two newly established dominions of India and Pakistan, violently divided and given to their respective administration. The right to determine their future and legal status was repeatedly denied to the inhabitants of the disputed areas, yet they pay the highest price for enduring, escalation-prone conflict. Moreover, being 'administered' involves the supposition of the provisional nature of controlling the disputed areas; it, therefore, assumes the right to self-determination regarding their legal status and future for people living on both sides of the Line of Control (LoC).[4]

Particularly detrimental to the quality of life in conflict-affected zones are recurrent violent clashes and crises, which occasionally led to full-scale wars and tensions between India and Pakistan, and regular ceasefire violations (CFV's) along the LoC and International Border (IB) by both sides. Moreover, the residents of the erstwhile PSJ&K are confronted with prolonged, structured militarisation[5] with its legalised impunity, which sanctions institutionalised violence, manifested by multidimensional dispossession, perpetual lack of juridical accountability persecution of dissidents with tacit or open approval of key decision-makers.

Kashmir, 'a state of exception',[6] remains a disputed area where the political, economic and legal supremacy of the central authorities is combined with unaccountability and impunity of the armed forces/intelligence agencies. Those regarded as enemies of the state are systemically and systematically dehumanised and stripped of their basic rights and freedoms. On the

one hand, the state claims to 'represent the will of the people', on the other, it upholds the political and socio-economic control and marginalisation, augmented by draconian law and order jurisdiction as the way to command, instruct and secure society.[7] It results in legitimised and normalised violence and disrespect for the rights and liberties inherent to all human beings in accordance with international law, negligence of basic norms and values, intrinsic to constitutional democracies. The unresolved conflict and hegemonic approach of key decision-makers leaked into the very fabric of Kashmiris' day-to-day lives on either side of the LoC, a *de facto* border separating IaJK and PaJK (Indian- and Pakistani-administered Jammu and Kashmir). In the aftermath of revocation of the IaJK's special status in August 2019, and bifurcation of the erstwhile state into two Union Territories, additional Indian forces were deployed in union territory of Jammu and Kashmir (UTJ&K), particularly in the Kashmir Valley, legitimising unprecedented militarisation and centralised rule over the region.[8] Strategically important chunks of PaJK (Gilgit Baltistan, GB, and Azad Jammu and Kashmir, AJK), are also rigidly controlled by Pakistani military and civilian establishment.

While constructing their antagonist postures domestically, the Indian and Pakistani key decision-makers refer to majoritarian hyper-nationalism with communal connotations, reflected by open hostility towards the minorities, civil society and progressive intellectual elites. The official narratives are formulated on self-serving presupposition that state faces persistent threat from unambiguously constructed enemies and there is a constant necessity to pacify and control them. The state-imposed concepts of narrowly defined 'national security' and 'national interest' are trumping human rights imperatives.[9] Being belligerent in their policies, both sides at the same time constantly point out that the well-being of the Kashmiri people is of the utmost importance to them. Systematic mutual Indo-Pakistani accusations on abusing human rights vis-à-vis the residents of the respective parts of the PSJ&K have become an inseparable feature of the dispute. They serve as a useful political tool for the stakeholders in both countries who want to divert attention from their own wrongdoings. In the Indo-Pakistani rivalry, the 'us versus them', an extensively politicised Hindu versus Muslim paradigm, is mainstreamed and serves the governments as an instrument for aggravating supremacist nationalism, mobilise radicals and introduce ferocious approach towards all chunks of administered Kashmir. Particularly in the Muslim dominated Kashmir Valley, people unite to protest against what they perceive as the arrogance of power and human rights violations perpetrated with impunity; some of them manifest their anger by joining militancy, stone-pelting, or organizing sit-ins, engaging in activism, etc. Other chunks of the former State of Jammu and Kashmir (J&K), namely Jammu and Ladakh, have their own distinctive narratives of dispossession, while at the same time they do not question their largely pro-India stance.[10] Some coordinated actions of local people against multi-faceted marginalisation are seen in PaJK: AJK and GB, too, albeit on much more limited scale than in the Valley, as they are instantly met with repressive

responses by Pakistan's *de facto* decision-makers (primarily the powerful army and the key intelligence agency, the Inter-Services Intelligence, ISI).

At the start of the third decade of the 21st century, the Indo-Pakistani rivalry is characterised by paradoxical, yet unsurprising, persistent reciprocity: the agitated calls for respecting human rights in neighbour-administered parts of Kashmir form a purposefully crafted political tussle and tug of war by the Indian and Pakistani ruling establishments. Mutual accusations reflect largely instrumental approaches to Kashmir and its residents. These narratives are rather not aimed to adopt any concrete steps to deal with contentious issues constructively, let alone to improve the human rights situation in Kashmir, but provide useful and profitable means to keep the conflict boiling and uphold the uncompromising positions, which thwart conflict resolution and bolster the arms race at the cost of crucial socio-economic emergencies.

Notes

1. Secular, civic nationalism of India versus religious nationalism of Pakistan. More: Ganguly (2016: 13–14).
2. Paul (2005: 3–4).
3. Diehl (1998: 2–3).
4. Bhan–Duschinski–Zia (2018: 9).
5. Hewitt (2005: 183–185).
6. Duschinski (2010: 113–114).
7. See Wibben–Turpin (2010: 358).
8. Balcerowicz–Kuszewska (2022b).
9. Ife (2007: 160).
10. More: Balcerowicz–Kuszewska (2022b).

14 Theorising resolution and reconciliation with reference to Kashmir dispute

Agnieszka Kuszewska

14.1 Reconciliation, resolution and human rights

The resolution of protracted conflicts and reconciliation processes in post-conflict, escalation-prone areas remain most challenging, and in many cases unmet, tasks for the international community and the conflict stakeholders. Global and regional rivalries, power struggle and particular interests of major international superpowers regularly disrupt peacebuilding initiatives and overshadow the human rights (HR) protection, which, at least declaratively, is guaranteed by international law to everyone, irrespective of their place of birth. Instead, we are offered grandiloquent declarations made during countless diplomatic meetings on bilateral and multilateral levels, manifested by empty sloganeering and unfulfilled promises.

They certainly appear to be in contradiction to the general approach vis-à-vis peaceful conflict resolution promulgated as a crucial principle of international law. For example, the Article 33 (1) of the UN Charter stipulates major tools of conflict resolution, saying that 'parties to any dispute (…) shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.[1] It adds that the UNSC may call upon the parties to settle their dispute by such means. All these methods have one common goal: promoting and maintaining the communication and dialogue between the parties.[2] Paragraph 2 of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, contains the principle stipulating that 'states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered'.[3] Referring frequently to such principles, on international fora, both Indian and Pakistani policymakers repeatedly declare their nonviolent intentions and assure their commitment to peaceful means of conflict resolution and cooperation. The actual willingness and space to compromise on Kashmir, and genuinely negotiate the contesting issues, is practically non-existent, though.

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Conversely, the Kashmir issue remains a major bone of contention in the international conflict between India and Pakistan, where both sides claim territorial control over the disputed area.[4] This antagonism is rooted in the unprecedented communal violence that characterised the partition of the subcontinent and was further exacerbated during the subsequent decades of protracted Indo-Pakistani rivalry with its communalised'Hindu-Muslim' dimension, simplified for the purposes of populist rhetoric. In India and Pakistan, nationalism functions as a powerful legitimising ground for the glorification of nuclear assets, and the military establishment's actions, including the 'necessary' use of the armed forces for domestic repression in the name of 'restoring peace and order'. The military and paramilitary forces are depicted by the state as symbols and defenders of national unity and integrity, which plays core ideological role in the ethnically and culturally diverse countries torn by local separatisms and militancy. The deliberate exaggeration of the alleged threat from the neighbour, self-projection as powerful state through a traditional realist logic (arms race and nuclear assets projected as essential hard power capabilities needed to be incessantly upgraded in the competitive world), accompanied by supremacist, religiously motivated nationalisms serve as a beneficial political tool for the establishments on both sides of the border. This narrative provides an excuse for the perpetual arms race and guarantee legal and institutional impunity to the state apparatuses which use excessive force and intimidation against those who contest them. In such environment, it is of no surprise that any attempt to find a resolution to the Kashmir issue, with inclusion of human rights-oriented approach, has been depressingly fruitless. The specificity of the regional security complex, where external powerful actors such as China or the United States pursue their own strategic goals in South Asia, and the nuclear aspect of the rivalry between India and Pakistan, where potential escalation might have disastrous consequences reaching far beyond the region, add another impediment to the resolution of the conflict.

Conflicts as ubiquitous phenomena and intrinsic components of interpersonal, intergroup and interstate interactions have been a crucial area of detailed studies in international relations[5] and other fields of research. To deliberate over conceptual framework for Kashmir conflict resolution, certain theoretical approaches should be briefly investigated as it seems crucial to contextualise the discourse within the general debate on de-escalation of intractable conflicts and durable peace-building initiatives. In the attempts aimed at conflict resolution, success is obviously never guaranteed and according to Louis Kriesberg and Bruce Dayton (2012: 212), 'the choice of de-escalating policies should be contingent upon the goals sought and the existing circumstances if they are to be effective'. The peaceful settlement of disputes is a highly complex process which should engage all involved parties who are able to compromise and, most importantly, take into consideration the interests of the people residing in the conflict zones. The readiness

to compromise and search for constructive solutions by the political elites are a *sine qua non* conditions for efficient conflict management.

The concept of reconciliation, the ways it should be managed and the challenge of building a post-conflict non-violent future, has been extensively discussed by scholars, organisations and practitioners.[6] Reconciliation pertains to a dynamic process which is conceptualised and articulated differently in various situations and geopolitical conditions and is strictly related to the specificity of a particular dispute and sociopolitical structures of the states involved. It may be understood as a coming together of former enemies, which are ready and capable to deliberate and implement settlement-oriented initiatives, although it is a complex and multileveled concept which lacks one conclusive definition. Ernesto Verdeja (2009: 3) argues that reconciliation refers to a 'condition of mutual respect among former enemies, which requires the reciprocal recognition of the moral worth and dignity of others. It is achieved when previous, conflict-era identities no longer operate as the primary cleavages in politics, and thus citizens acquire new identities that cut across those earlier fault lines'. He appositely contends that the dynamics of reconciliation initiatives among political elites is different from those among regular individuals in the private sphere, and the requirements of institutional reform contain certain normative imperatives that differ from the demands and expectations that can be placed on civil society and thus reconciliatory efforts should be focused on different social levels; political society, civil society, institutional and individual. Effective reconciliation process vis-à-vis Kashmir should be preceded by addressing and negotiating the contentious issues within such a multidimensional agenda. The resumption of talks on the governmental level is usually facilitated when preceded by the rejection of the use of force, cessation of CFV's (ceasefire violations) and expressing the willingness to discuss fragile issues, for example through backchannel dialogue. This could be achievable by India and Pakistan and could create initial discursive and diplomatic space for the resumption of the Composite Dialogue on solutions that are durable and acceptable to all major stakeholders (Indians, Pakistanis, the residents of the erstwhile Princely State of Jammu and Kashmir, PSJ&K). Nonetheless, the incessant fights and CFV's along the LoC recurrently affect people living along the border and remain a crucial element of mutual accusations. Moreover, Indian and Pakistani decision-makers, as well as some Kashmiri leaders, operate with disregard to long-term solutions due to their irresponsible, jingoistic policies,[7] combining it with personal power ambitions.

Violent, unresolved conflicts, such as Indo-Pakistani, tend to re-escalate regularly which further upgrades role of the state security apparatus in the strategic and political decision-making process on multidimensional level. It is followed by the indiscriminate deployment of force (secret service, police, paramilitary units and army) in the fragile, disputed areas, usually without the consent of their residents or taking into consideration their interests and aspirations. Civilians are always put in the situation of heightened

vulnerability during and in the aftermath of the armed conflicts, being unintentional victims of landmines, the shelling of villages (which happens regularly along the LoC), experiencing permanent fear and harmful physical (including custodial deaths), psychological and economic repercussions at the hands of the armed forces (military, paramilitary forces, mercenaries and police), central governments, militants, local political leaders, separatists, etc.

Protection of human rights of affected communities is one of the key frameworks for deliberations over protracted conflicts and their resolution. Referring to the debate on interrelations between HR, legal systems and cultural features, Jim Ife (2007: 165) argues that the law and legal rationality should be portrayed as only one part of understanding and materialising human rights-based order. He writes: 'A society that protects and realizes human rights *must have those rights embedded in its culture, not merely codified in its laws* [italics—A.K.]. Working for human rights is not the sole prerogative of the lawyers; it is also a task of teachers, community workers, health workers, religious leaders, politicians, and indeed it is the task of all citizens, in their various roles of parent, child, relative, supervisor, colleague, workmate, community member, lover and friend'. The actual commitment for human rights protection of vulnerable groups and minorities poses a challenge in the highly hierarchical sociopolitical structure of India and Pakistan. Even if the rights and freedoms are guaranteed and codified in a country's legal system, there are special provisions which assure impunity to the powerful decision-makers who act in the name of self-justified law and order, or by implementing extra-legal practices.[8] The persistent state-led discourse on what should be regarded as national interest and security threat, serves as useful strategic tool and a pretext for combative governments to introduce draconian legislation against their own citizens, the laws which theoretically protect them, but in reality, further supress their rights and provide impunity for the perpetrators of HR violations. In IaJK, such arbitrary state-authorised instruments as the Jammu and Kashmir Public Safety Act (JKPSA 1978) and the Armed Forces Jammu and Kashmir Special Powers Act (AFJKSPA 1990, also referred to as AFSPA) were introduced to provide impunity to Indian armed forces excessively deployed in the Kashmir Valley. These legislations, among others, make Indian decision-makers particularly inclined to employ forcible solutions in order to overcome the militancy and *jihādism* in this chunk of the former State of Jammu and Kashmir. On Pakistani side, all forms of protests against the government's policy, where local politicians and the judiciary have no executive power, are subjected to immediate suppression. Human rights activist, based in Azad Jammmu and Kashmir (AJK),[9] maintains that everything is controlled by shadows employed by the state, and there is no transparency and no accountability. Under the claim of protecting national security, people in divided Kashmir are subjected to various forms of deprivation—arbitrarily arrested and incarcerated, summarily executed,

tortured and killed. In such restive circumstances and oppressive policies, any local initiatives which would refer to coexistence or cross-LoC cooperation are expunged; instead, the violent intergroup relations are enhanced by divisive policies, accompanied by prevalent lack of trust vis-à-vis the state institutions on local and national level.

In belligerent environment, peaceful resolution as the ultimate goal to end protracted conflicts remains in the interest of the society as a whole (persistent oppression and fear prompts the victims to opt for cessation of aggressive measures and resolution) but is not necessarily the goal of military establishments and other major stakeholders. Moreover, the interpretation of international legal obligations by the governments remains an open question. Martin Scheinin (2017: 18) maintains that 'as a legal system, international law is relatively weak. There are rarely mechanisms for independent international-level enforcement of the rules of international law. (…) Often states themselves are the interpreter-enforcers of international law. All this contributes to the perceived indeterminacy of international law, particularly in the eyes of so-called "relativists" for whom conduct by states is the ultimate criterion for what is regarded as law and what is not'. Otomar Bartos and Paul Wehr (2002: 37) argue that a belligerent culture further contributes to increasing incompatibility of goals. This supposition if fully coherent with the specificity of historically embedded Indo-Pakistani rivalry with postcolonial traumas and deep mistrust, systemically and systematically reinforced by the official narratives. Moreover, both formulate their policy vis-à-vis Kashmir based on ideologically driven national identity, which categorically incorporates the disputed territory within their respective boundaries. According to this rhetoric, which was adopted as inalienable pillar of political culture in both states, controlling Kashmir should not be subjected to any compromise or reconciliation-oriented reconceptualisation.

Theoretical debates and research methods of conflict resolution and peace research have significantly developed in the post-World War II period, particularly since the 1970's. The gradual evolution of international system with global UN and regional integration initiatives and unprecedented institutionalisation of international relations resulted in enhanced professional analysis of how the conflicts emerge and what collectively crafted peacebuilding initiatives and measures should be introduced to facilitate a war-to-peace transition. Case studies approach was supplemented with confidence building measures (CBM's) investigation, quantitative analysis of violence and arms races on regional and global level, the role of international mediation and conflict negotiations. As the purpose of this chapter is not to provide a detailed analysis of these debates, only selected examples, useful for this study, will be scrutinised.

Johan Galtung, a prominent peace and conflict scholar, analysed the concepts of cultural and structural violence. He distinguished between negative peace and positive peace, which is worth mentioning in these deliberations. The negative peace is understood as the absence or removal of all

psychical violence and averting the imminent threat of war or reducing/ending the war if it already exists, the positive peace focuses on multilayered restoration of relations.[10] Peace is defined not only as the absence of direct aggression but also as a freedom from cultural and structural violence. We can enumerate certain criteria of negative peace: (a) absence or low level of structural violence so the basic human needs are met, (b) rejection of animosity and hatred, (c) rejection of terrorism, (d) rejection of marginalisation, intimidation and threat, (e) lack of negative emotions.[11] Negative peace, as conceptualised by Galtung and other researchers who followed or expanded his ideas,[12] is a precondition for positive peace, which aims at attaining the culture of peace that ensures long-lasting peaceful and just relations, including social justice (fairness), human rights, etc., and helps to rebuild nations emerging from violent conflicts. Positive peace refers to a situation with 'egalitarian distribution of power and resources'.[13] Prerequisites for peace comprise several indicators: (a) granting human rights, (b) equality, (c) acceptance/tolerance (understanding and solidarity), (d) goodwill and ability to forgive, (e) democratic participation, (f) openness to working toward a mutual goal, (g) security and (h) access to resources.[14] Moonis Ahmar (2014: 163–164) presented a 'secular toolkit' which could contribute to the resolution of conflicts without biases and prejudices with pragmatic and rational understanding of the conflict, tolerance, accommodation and coexistence, and, importantly, favouring a multicultural approach in order to deal with issues emanating from cultural, ethnic and religious diversity. Such approaches constitute a holistic perception of preconditions for peace and human rights protection, assuming that reconciliation is a complex, lengthy process. All these prerequisites are particularly important in convoluted realities and mutually exclusive narratives regarding the Kashmir issue, but they have to be profoundly scrutinised and appropriately adjusted to the empirical study, as the theoretically sketched, faultless matrixes are not sufficient to comprehend the on-ground realities.

With its remarkable combination of intensified violence, multiple grievances, popular resistance and counter-narratives, Kashmir conflict serves as a unique case study of a complex, enduring rivalry, but at the same time bears some resemblance with other protracted, escalation-prone disputes. Conspicuously, the framework for the debate over its potential de-escalation with protection of human rights should be contextualised within a current discourse on resolution, peacebuilding and post-conflict management and should include the adaptation of these objectives to the particular features of the dispute. Similarly to Israeli-Palestinian dispute, another major flashpoint with multidimensional consequences, Kashmir conflict is seemingly irreconcilable, attracts global powers, which expand their spheres of influence by upholding strategic alliances. Both conflicts have postcolonial heritage of British occupation and international organisations/community have dismally failed to resolve them. Notably, there is another noteworthy linkage between the narrative of nationhood articulated in the Kashmir Valley and

the Palestinians' cause. This connection also deals with the forms of struggle against what Kashmiri Muslims and Palestinians perceive as a state-imposed oppression. According to David Devadas, around 2007 a new trend of self-perception manifested itself among young Kashmiri Muslims; they learned to call themselves an occupied Muslim nation and compare Kashmir with the Palestinian *intifada* against subjugation.[15] This affinity was also reflected in the book edited by Sanjay Kak and portraying Kashmiri resistance particularly during 2010 escalation; the book had a meaningful subtitle *The New Intifada in Kashmir*.[16] The communalised 'us versus them' dichotomisation is therefore not only reflected internally by the dynamics in this chunk of Kashmir, with its collective sentiment of resistance transferred from generation to generation,[17] but also additionally seeks for ideological framework and similarities (the reference to the nation by Kashmiri Sunnī Muslims) in other parts of the world.

Various aspects and multilayered contextualisation, encompassing historical, sociopolitical and economic factors, must be taken into consideration when analysing the reconciliation and resolution of such intractable disputes. Kriesberg and Dayton (2012: 188) emphasise in their theoretical analysis of the cyclical nature of conflicts, that 'within each adversary, social, psychological and organizational developments can advance conflict de-escalation. They contribute to each side's members considering their own responsibility for the conflict's course, rather than simply blaming the other'. Such discourse shifts, which precede the actual de-escalation efforts on political level, are particularly relevant with reference to historically inherited, complex and enduring rivalries, such as Indo-Pakistani. The conflict narrative should, therefore, be reframed with stakeholders' reinforced notion of responsibility and the ability to compromise in the way that the potential solution becomes not only conceivable but also multilaterally beneficial.

CBMs between India and Pakistan have a potential to beneficially impact the entire South Asia, the least politically and economically integrated region in the world. They should include a variety of initiatives negotiated between states that 'attempt to remove the possibility of sudden and unexpected conflict, improve relations and over a period of time create conditions to develop substantial cooperation in the region'.[18] These are the crucial mechanisms enhancing the trustworthiness of states and validating diplomatic capabilities of their leadership. Building trust in protracted conflicts such as Indo-Pakistani is an enormously challenging and long-term endeavour, which requires multi-faceted skills, political maturity and profound understanding of broadly delineated development patterns in modern democracies. It is commonly agreed that addressing security threats is not restricted only to military aspects but it combines sociopolitical, economic, cultural and environmental issues and requires a multisectoral approach. Confidence is the product of much broader patterns of interactions than those which relate to military security; it is 'woven into a complex texture of economic, cultural, technical and social relationships'.[19]

HR protection should also be included as key point of reference in defining and addressing multi-dimensional security threats.

The debate over Kashmir dispute resolution needs to be regarded as part of a general discourse on equality, democratic governance and the quest for inclusiveness, which pose an intrinsic challenge in countries torn by internal cleavages, such as India and Pakistan. Systemically augmented suppression of minorities' rights and freedoms in both countries adds additional discursive framework to these delibarations. As Holt *et al.* (2016: 293) view minority rights as 'an important subset of international human rights standards which function to ensure that all human beings, including persons belonging to minorities, are able to enjoy fundamental rights and freedoms on a basis of full and effective equality in law and in fact'. They emphasise that safeguarding and promoting minority rights helps to compensate 'imbalances arising from the non-dominant position of minorities within states which often leaves them marginalized and disadvantaged in terms of the maintenance and development of their own identities, access to public services and other resources and opportunities, and equal participation in society'. Effectively managing the afterlife of intra-state and interstate violence and the relations between the victims and perpetrators is another challenging task in the process of transition from conflict to reconciliation process and auspicious cooperative initiatives. Providing appropriate redress for grievances and compensation to the victims and retribution for the perpetrators contributes to ceasing the self-perpetuating cycle of violence. A successful reduction of incidents of violence which is one of the preconditions for conflict resolution, requires adopting relevant and rational rather than ideologically driven strategies combined with an in-depth analysis of historically inherited local narratives and power rivalries, the socio-economic conditions of the particular region and the goals of the engaged actors.

14.2 The manifestations of the intractable conflict

Kashmir conflict and Indo-Pakistani interactions are often regarded through the prism of a legacy of the *divide et impera* policy on the Indian subcontinent and its multidimensional consequences. Its complexity and intractability stems from mutually exclusive strategic objectives both states implemented: Pakistan's persistent territorial claims related to the *Kaśmīr banegā Pākistān* (Kashmir will belong to Pakistan)[20] doctrine with its overwhelmingly Islamic quest and the far-right Hindutva ideology, which has become a prominent element of India's domestic and foreign policy especially under Narendra Modi's government. The hawkish communalism is exacerbated by the Pakistani and Indian ruling establishments and has a substantial contribution in polarisation of societies and escalating religious antagonisms on internal (bashing of religious minorities) and bilateral (Indo-Pakistani) levels. From the point of socio-economic development, these policies are utterly counterproductive and—it needs to be firmly

highlighted—have never brought durable socio-economic benefits to ordinary Pakistanis and Indians, let alone, Kashmiris.

Stephen Cohen (2013: 138) terms intractable conflicts 'paired minority conflicts'; they are rooted in the persistent perceptions held by important groups on both sides that they are threatened with attack from the other side. Zeev Maoz and Ben Mor (2002: 5) appositely contend that persistent, durable rivalries are characterised by certain major features:

- strategic interdependence between the adversaries,
- psychological manifestations of enmity,
- repeated escalations to a militarised struggle,
- numerous unresolved disputes.

All these aspects empirically exemplify the Indo-Pakistani antagonism. Contrary to polarising and contentious mainstream narratives, which deliberately aggravate mutual hostility between Indians and Pakistanis, both neighbouring states are strategically and economically interdependent and without their mutual rapprochement no regional progress and development is feasible. The societies are growingly polarised, and intentionally mobilised along the ethnoreligious lines in order to fulfil the self-serving goals of the leaders who deceptively pose as 'unifying the nations', while in reality they are demagogic despots, who undertake various efforts to stay in power and safeguard their status. Such states are particularly corruption-prone and provide privileges to a narrow self-appointed elite, unconditionally obedient to the leaders who detest any dissent.

The successive generations of both states are brought up in the shadow of conflict with school curricula manipulating or selectively highlighting historical facts to serve as an ideological flywheel, usurping oral superiority, strengthen the enmity and religiously motivated hatred. Public domestic opinion is constantly inflamed by the leadership's fiery speeches and compliant media narrative. People become deeply psychologically and emotionally engaged in the ongoing belligerence, which is often manifested by arousing vociferous patriotic fervour in bilateral, intercommunity and state levels relations, via social media, Internet, press, TV, textbooks, etc. In such circumstances, there is a limited prospect for developing social fragility, empathy, respect and equality-based approach vis-à-vis the rights and freedoms of the marginalised and dehumanised communities. There is a growing social acquiescence for stigmatisation and open violence, including immunity of armed forces which often act brutally, against those who are pointed out as 'enemies of state'.

Apart from Kashmir issue, India and Pakistan are involved in other unresolved disputes, causing plight to civilians, of which Sir Creek/Rann of Kutch serves as the exemplification. It refers to the uncertain maritime boundary status of a 96-km-long estuary in the marshlands of Rann of Kutch. This area separating the Indian Gujarat state and Pakistani Sindh

province is considered an important fishing resource; the dispute has its origins in colonial times. The fishermen of both countries unwittingly cross into the neighbouring territories and get arrested by its authorities and spend years in custody, often being tortured and humiliated. Their situation deteriorates even more, whenever the relations between India and Pakistan escalate. Thus, the fishermen community and their families, entirely depending on fishing as the major source of income, get trapped into the Indo-Pakistani tussle. According to a prisoners' list, which is exchanged by both states twice a year (on 1 January and 1 July), as of January 2021, there were 263 Pakistani civilian prisoners and 77 fishermen in Indian custody and 49 Indian civilians plus 270 fishermen in Pakistani jails. Resolving this conflict by applying a more lenient approach towards stranded fishermen could serve as manifestation of goodwill gesture and pave the way to tackle other contentious issues.

Enduring rivalries occur mostly between the states that are unable to ultimately dominate or defeat each other and terminate the conflict by unilaterally imposing their will. John Vasquez (2005: 61) argued that territorial disputes are so intractable because 'concrete tangible territorial stakes, like pieces of land, that are in principle divisible, become infused with "symbolic" and even "transcendent" qualities that make them intangible, perceived in zero-sum games, and hence difficult to divide'. The illustration of Kashmir as a scenic 'paradise on Earth' is contradicted by the iron-fisted policy and extensive security apparatus presence is used by India and Pakistan as a manifestation of their majoritarian narratives and as a tool to protect and control their territorial gains in Kashmir. Protracted and difficult to resolve, this dispute may be termed as a territorial and cross-border conflict with diverse nature claims and multiple dimensions and actors with asymmetrical status, resources and capabilities. On the one hand, there are the Indian and Pakistani civilian and military leaderships, while on the other, various organisations or groups which claim to represent the residents of the former PSJ&K. The pleas articulated by them vary from self-determination (contradicted with the protection of territorial integrity and unity expressed by India and persistent territorial claims vis-à-vis IaJK by Pakistan), unification with Pakistan (Islamic groups in the Valley) to independence or enhanced autonomy within Indian or Pakistani constitutional frameworks. Based on empirical evidence from research in Indian- and Pakistani-administered Kashmir, it may be assumed that the indigenous residents of Kashmir on both sides want equality, economic development, cross-border connectivity, political participation and empowerment in solving their local issues, religious/cultural rights, profitable access to their resources and material support when necessary.[21]

The memories of 1947 partition of the subcontinent and subsequent wars remain a historically inherited factor, an inseparable element of the 'popular psyche', a sense of tragic loss within the former PSJ&K (divided families, cross-border movement depending on the state of relations between

India and Pakistan at the moment, with Kashmiris being sidelined from the decision-making process). The persistent trauma within and outside Kashmir is used by the establishments of India and Pakistan to produce 'the only' historical truth to uphold their aggressive narratives and glorify the use of force against the enemy. The postcolonial legacy of partition and its permanent presence in the collective memory enabled stakeholders to strengthen the nationalist discourses, the rhetoric of division and communal enmity on both sides of the border. Partition had deep, long-term and (so far) irreversible political and sociological consequences for the subsequent generations of Indians and Pakistanis. Robert Rozehnal (2007: 91) accurately summarised the inception of political entities: 'in the twilight of the colonial age, India and Pakistan—and later Bangladesh—were first imagined, and then delineated, inscribed, and institutionalized. New passports and redrawn boundaries on maps were merely the final step in a prolonged and often tumultuous process of imagining the nation'. The story of the divided PSJ&K unfolded against the backdrop of these dynamic sociopolitical changes. Furthermore, it needs to be postulated that the Kashmir issue is not only about the territory and territorial irredentism. It encapsulates a plethora of components: identity, nationalism, power procurement, historical inheritance, communal rivalry, radicalisation, economic and social issues. The conflict is particularly complex also because it directly or indirectly engages many internal and external actors with diverse interests and different abilities to materialise their goals. This unique complexity has to be taken into consideration in any endeavours for justice-based solutions and while debating the frameworks for future de-escalation and reconciliation.

Like all other protracted conflicts, Indo-Pakistani animosity is a historically inherited phenomenon for which the impediments for the resolution have mounted throughout more the history of bilateral interactions and domestic dynamics within each of the states. For instance, the far-right Hindu ascendancy to power in India needs to be investigated with reference to certain processes which have been evolving on multiple sociopolitical levels in pre-and postcolonial India. The Hindu supremacist far-right National Volunteer Organisation (RSS) was established in September 1925 to unite a 'Hindu nation' (which could be dubbed as 'one nation theory'); it gradually expanded to influential umbrella organisation mobilising religious fundamentalists who claim the right to control Indian society by imposing their ideological beliefs, implementing them into foreign policy and shaping the official narrative vis-à-vis Pakistan.[22]

In Pakistan, the ideological role of the two-nation theory, to which the founders of the state referred, particularly Muhammad Ali Jinnah[23], crafted an adequate framework for religiously motivated nationalism, which laid the foundation stone for the inception of a new state. The very idea of Pakistan as the state established especially for Muslims incorporated the significant risk of exclusivist domestic agenda and persecution

of those who will not suit the establishment-imposed definition of the citizen of 'the land of the pure'. Pakistan's security dilemmas based on Indiocentrism, upheld by the military establishment, have been manifested throughout the decades by structurally and institutionally supported anti-India rhetoric. Hindus and their culture are depicted as openly hostile to Pakistan, supportive to the alleged strategic objective of India to undo the partition. As K.K. Aziz (1993: 193–195) argued in his book *Murder of History,* the textbooks present India as the enemy state with hostile intentions. The textbook Pakistan Studies Grade 9, distributed in 2018 in government schools of Punjab, states: 'Pakistan is an ideological state. It is based on a specific philosophy of life. Its basis is the religion of Islam. … No doubt, the Islamic ideology is the foundation of the ideology of Pakistan. …. When British rule was near its end, it was evident that the Hindu majority government will be formed in the subcontinent. It was feared that after getting rid of temporary slavery of the British, the Muslims will become permanent slaves of the Hindus'.[24] Notably, the book does not mention the 1947 Pakistan-backed tribal invasion in Kashmir. Notwithstanding, it argues that 'Indian Armed forces occupied these states (apart from J&K also Hyderabad and Junagarh—A.K.) through military action. This increased the feelings of distrust towards India'.[25] The *Pakistan Studies* textbook Grade 10 highlights the centrality of the Kashmir dispute within Pakistani policy and blames India for the lack of resolution of the conflict: 'The main dispute between Pakistan and India is the Kashmir issue, and without its solution the relations cannot be improved. Better ties can be established between both countries in all fields if it is resolved. *Pakistan had always showed a positive attitude, but India is not serious about resolving this issue.* … Pakistan is firm in its stand that the Kashmir issue shall be settled according to the resolutions of the United Nations and the wishes of the *helpless Kashmiris*' (italics—A.K.).[26]

In India, the Hindutva nationalists systematically change the content of the textbooks to manufacture majoritarian approaches, re-shape the national identity and make it more fit into their exclusivist narratives of a 'Hindu nation'. Visweswaran *et al.* (2009: 103–104) argue that the nationalist framing of curricula was bolstered when the BJP first came to power in 1998: 'Sangh (the Sangh Parivar, the family of Hindu nationalist organisations—A.K.) sympathisers were placed on the National Council for Education and Research Training (NCERT), the school curriculum development and review body at the national level. Over the next several years, NCERT introduced changes to the school curricula in alignment with the Sangh' s agenda'. The authors point out that the nationalist approaches, introduced in BJP-ruled Gujarat textbooks, associated extremism with Islam and identified Pakistan as a 'den of terrorism'.[27]

In both countries, much to the dismay of progressive, professional scholars and researchers, the education systems are ideologised and politicised; the whole history of bilateral relations is intentionally distorted to prove

these binary divisions. For example, the perception of 1947 communal riots differ depending on which state it is officially presented—in Pakistan, they were initiated by the Hindus and Sikhs and the Muslims were the major victims of aggression. In India—the Muslims are projected as instigators of violence. In both states, the education system serves as an important means to promote a strong national ideologically structured identity and to create a sectarian, exclusivist worldview. There are some initiatives to change this narrative in both countries, but this approach is not part of the mainstream policy.[28] Contesting state-led rhetoric is rather limited to certain groups, namely, those already well educated and fluent in the history of the subcontinent, and those who are willing to broaden their knowledge and are bold enough to speak out.

14.3 The multitrack framework and three-level approach

Conteptualising resolution of the Kashmir conflict is a complex challenge, which should include a multilayered, negotiated roadmap aimed to reduce tensions between India and Pakistan and find solutions beneficiary and acceptable to the disputed areas' indigenous inhabitants. The political, diplomatic, peacebuilding practitioners frequently discuss and propagate conceptual conflict settlement approach which includes diverse initiatives referred to as 'tracks'. The three levels of multitrack framework which constitute the peacebuilding architecture were conceptualised by John Paul Lederach (1997: 39). If we adopt them to Kashmir conflict resolution, with broad identification of all factors which should facilitate the dialogue, they should include:

- Track I—top India and Pakistan leadership, conferences, summit talks, high-level meetings discussing prime objectives of security-related, economic and social policy guidelines, implementing ceasefire regulations, discussing trade challenges, engaging international organisations, accepting international mediation (of which outcome has non-binding character, but it may help to enhance the rivals' will to concede), inviting representatives of most prominent leadership from Kashmir (all chunks).
- Track II middle-range talks—ethnic, religious middle-range leadership, retired politicians, officers, academics, human rights activists, NGO's, other practitioners, who engage in problem-solving discussions, seminars, workshops, participate in peace-oriented commissions, identify CBMs, establish teamwork platforms to ensure regular exchange of thoughts, etc.
- Track III—grassroots leadership, indigenous, local leaders and other representatives who engage in peace initiatives, prejudice elimination, socio-economic collaboration, etc., identify CBMs on a local, (cross-LoC) level. Apart from local leaders, this framework should be

exceptionally inclusive and engage local business community, traders, academia, journalists, NGOs, civil society activists, lawyers, doctors, students, representatives of minorities, etc.

Resolution-oriented framework with various actors participating in diverse initiatives was introduced and developed as part of the composite dialogue between India and Pakistan. In particular, multitrack scheme was practically introduced in the early 21st century, with 2003 revitalisation of the bilateral peace talks and launching grassroot cross-LoC initiatives (*vide infra*, §15.2).

While debating on what impacts or hinders Kashmir dispute settlement and how to address these problems, multiple factors need to be taken into consideration.[29] The internationally conditioned structural complexities and the fact that the conflict is entangled in diverse competitive narratives engaging various local, regional and global actors inspire to depict these challenges with reference to three levels of analysis: international, bilateral and, importantly, multilateral/local (with inclusion of all pieces of the erstwhile PSJ&K). Conceptualised below, it provides a framework for understanding the multi-layered challenges to the resolution of the dispute:

1 The international level:

   a The post II-world war specificity of the international world order, in which in accordance with the UN Charter, the five UN Security Council permanent members (P5) enjoy the privilege to take major decisions regarding vital security issues, including the conflict resolution initiatives. Due to various security-related and geostrategic interests of these powerful actors, their systematically repeated, declarative commitment to finding peaceful solutions in Kashmir is overshadowed by largely curtailed capabilities of the international community to mediate in the Kashmir conflict. India's uncompromising bilateralism and opposition to any foreign engagement additionally play an important role in constructing the outsiders' narratives vis-à-vis the region, with emphasis on mutual Indo-Pakistani dialogue. Moreover, South Asia continues to be a key point of geostrategic reference for the major powers, including the P5, which are engaged in arms trade with both rivals (*vide infra*, § 15.1).
   b Unwillingness to engage more diplomatically by the countries which claim their highest commitment to democracy, human rights and liberties, even when the human rights abuses in Indian and Pakistani-administered Kashmir get international coverage (OHCHR 2019). Persistent Western narrative on India as the largest democracy in the world, even though under BJP/RSS rule, Indian democracy significantly backslides and increased violence affects the minorities. Even the European Union, which stalwartly adheres to democratic values and human rights, restricts itself from officially referring to the situation in India. At the end of January 2020, the European Parliament postponed

voting on draft resolution on India's Citizenship (Amendment) Act, 2019. The proposed resolution additionally criticised the bifurcation and the crackdown in Kashmir. As of early 2021, Pakistan remains a major non-NATO ally even though it has not managed to curb terrorist activities of radical Islamic proxies in the region. It is regarded as strategic partner in Afghanistan peace process, even though it has a decades-long history of supporting *jihādist* groups.

c Multiple mutually exclusive geostrategic and economic interests and historically developed ties with South Asian rivals by the United States, China and Russia. Some patterns of security-related collaboration date back to the Cold War and were developing afterwards. China enhancing its footprint in South Asia security system may have meaningful impact on the trajectories of Indo-Pakistani dispute. The particular dynamics is also connected with the rise of oil-rich Saudi Arabia, which started in the 1970's and contributed to enhanced regional sectarian rivalry and gradual political mainstreaming of Islamic fundamentalism in Pakistan in politically favourable conditions (Zia ul-Haq's regime in Pakistan, Soviet intervention in Afghanistan)[30].

2 The bilateral Indo-Pakistani level:

a Enduring Pakistan's security dilemmas stemming from power imbalance, unequal warfare capabilities and resulting in offensive asymmetric tactics employed by Pakistani proxies. Both countries are entangled in the policy marked by deep distrust, perpetual mutual accusations and the inability/unwillingness to compromise. Those who advocate dialogue are recurrently labelled as unpatriotic and anti-national.

b Mutually exclusive components of ideologically driven identity with religion as its major signifier, which refers to hawkish hyper-nationalism and communalism. The sense of purported moral superiority serves as an excuse to pursue belligerent rhetoric and to resort to violence against religious minorities and those who question the state-imposed, national narrative in both states.

c Irreconcilable geostrategic positions vis-à-vis disputed territories taken by India and Pakistan. The former considers the entire erstwhile PSJ&K as its integral part, the latter perceives Indian chunk as disputed area; both are seeking international support and claim sovereignty over Kashmir without genuinely taking into consideration the aspirations of all its residents on both sides.

3 The multilateral/local level:

a Postcolonial, abusive and militarised methods of exercising power in their respective parts of the erstwhile PSJ&K by Indian and Pakistani civilian and military establishments. Lack of efficient and meaningful incorporation of representatives of inhabitants of all pieces of Kashmir to the CBMs and composite dialogue (multilateral talks);

b Systemic control of the affairs and resources of respective administered territories by the centre (New Delhi or Islamabad/Rawalpindi); political and economic deprivation of indigenous inhabitants.
c The need to acknowledge local vulnerabilities, heterogenous character of the erstwhile PSJ&K and to take into consideration different power discourses within the Kashmir Valley and vis-à-vis other regions of the IaJK: for example, Hindu majority districts of Jammu and Buddhist-dominated chunk of Ladakh, and within PaJK (Shīʿa majority in Gilgit-Baltistan). Markedly, these complex discourses and various ethnic identities often go beyond religious affiliations.
d Distrust of the governments, ruling, political elites, state institutions and security forces permeating the relationship between the residents of all parts of Kashmir and the federal authorities in India and Pakistan. It is intensified by enduring lack of effective governance on a local level through a popularly and independently elected representative government. The narratives of subjugation, neglected grievances, populist, unfulfilled promises (by local and central decision-makers), economic and political suppression characterise all regions of the former PSJ&K, albeit with diverse intensity. For example, Ladakhi Buddhists did not want to be administratively and politically connected with the Valley and supported the bifurcation of Kashmir and transformation of Ladakh into India's first Buddhist-dominated union territory. Nonetheless, at the same time they demanded from the centre safeguarding their rights and genuine development initiatives, neglected by all previous administrations, including the BJP. Similar voices are heard from Jammu.
e The activities of violent actors (Islamic organisations, armed militants), those supported by Pakistan and indigenous. They enforced radicalisation of local communities (particularly noticeable in the Kashmir Valley) and intentionally intensified ethnic and communal rivalries.

Developing a cooperative roadmap and peace process in Indo-Pakistani relations should be conceptualised and worked out with taking into consideration all these complexities. International pillar should include the United Nations forum to which both countries referred once the conflict started, with its human rights-oriented bodies (such as the UN Human Rights Council), other international organisations (the European Union) and states which could facilitate the rapprochement and dialogue. That would require a major recalibration of Indian and Pakistani rhetoric articulated at international fora, which are now regrettably used only for mutual accusations and belligerence, with no particular achievements. On a regional level, the Track I and II frameworks should be engaged to develop bilateral interactions and to strengthen the South Asian Association of Regional Cooperation (SAARC) to use this already existing platform for regional connectivity, composite talks and multidimensional cooperation.

The bilateral pillar should include a multitrack mechanism of consultations based on reciprocal flexibility to be applied to the management of the ongoing disputes. (Re)introducing a policy of Indo-Pakistani soft response and composite dialogue should be prioritised, providing incentives for mutual CMB's, focused on two prerogatives: enhancing *détente* and providing diplomatic, institutional mechanisms to discuss the challenges with which neither India nor Pakistan can deal separately, such as climate change and environmental problems, natural disasters, growing shortage of resources (water), transnational terrorism. Economic cooperation should be recalibrated with its 're-connectivity roadmap', consideration on (re) introduction the Most Favourite Nation scheme in bilateral trade, working on multidimensional initiatives and connectivity projects, which could lead to a future South Asian economic trade corridor.

Multilateral/local pillar with particular significance of Track III initiatives policy vis-à-vis all chunks of former PSJ&K, should refer to Kashmir-Oriented Confidence Building Measures (KOCBMs, *vide infra*, §17) and engage Indian, Pakistani representatives, local NGO's and participants from the Valley, Jammu, Ladakh, Gilgit-Baltistan and Azad Jammu and Kashmir to optimally accommodate divergent interests. Supporting such concerted initiatives and establishing platforms for meeting and exchanging views with inclusion of the representatives of these regions, providing people with political agency, re-assessing them as the owners of their land and households not as victims of structural oppression, fostering cross-border trade exchange and people-to-people contacts, should become a pivotal de-escalation mechanism, which would help restore or build trust of these people vis-à-vis the respective central governments and other state representatives.

Notes

1. UN Charter.
2. de Waart (1973: 31–32).
3. UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the UN Charter, 27.10.1970. UN Charter (1945).
4. Bose (2013: 227), Ahmed (2013: 295).
5. Deutsch (1969: 7–41).
6. See for example: Galtung–Jacobsen (2000), Quinn (2009).
7. Mattoo (2003: 13–29).
8. See: Balcerowicz–Kuszewska (2022b).
9. Name withheld.
10. Eichler (2017: 3).
11. Galtung (2016).
12. Miheljak *et al.* (2013: 54–55), Turan (2015: 111–113).
13. Galtung (1969: 183).
14. Miheljak *et al.* (2013: 55).
15. Discussion with David Devadas, New Delhi, 7 October 2019. See also: Devadas (2018: 3–4).
16. Koithara (2004: 242), Kaul (2011: 25).

17. Ali (2011: 3).
18. Banerjee (2001: 80–81).
19. More: Holst (1983: 2, 4).
20. From the early childhood Pakistanis are taught that 'Kashmir is the jugular vein of Pakistan'; separatists from the Valley, such as Syed Ali Shah Geelani, are portrayed as heroes of struggle against Hindu oppression. According to many experts and common Pakistanis, the establishment-imposed revisionist narratives and quest for Kashmir should be replaced by cooperative initiatives, economic development and peaceful relations with India. Conclusion based on numerous conversations held in Pakistan with students, activists, journalists, academics, etc., in different regions/provinces.
21. These claims generally characterize disputed areas. See Stefan Wolff's (2003: 15) analysis of the conflict dynamics.
22. Balcerowicz–Kuszewska (2022a, chapter 13; b, chapter 3).
23. Balcerowicz–Kuszewska (2022a).
24. Choudhary–Azam (2017: 3–5).
25. Choudhary–Azam (2017: 9).
26. Dar (2014: 33–34).
27. The content analysis of textbooks in India and Pakistan with regard to their mutual interactions, ideologically distorted historical facts and deliberately projected 'us versus them' communalism, deserves a separate in-depth study.
28. Such an initiative was a theatrical piece, 'The Narratives of Partition' presented in 2015 in Islamabad, which I attended. It was based on the true stories of the partition which recalled the tragic memories of the witnesses—Hindus, Muslims and Sikhs, who were presented both as victims and as the perpetrators of communal violence. The authors had collected the stories in both countries.
29. Behera (2006: 73), Bose (2003: 207), Cohen (2013: 140–141).
30. More: Balcerowicz–Kuszewska (2022a).

15 Kashmir conflict resolution

Selected proposals and attempts

Agnieszka Kuszewska

More than seven decades of Kashmir dispute brought numerous plans, formulas, and resolution initiatives proposed and negotiated both multilaterally and bilaterally by India and Pakistan, yet both South Asian neighbours remain in protracted rivalry. The urge to resolve the conflict is repeatedly underscored by the key decision makers in India and Pakistan, by Kashmiri representatives and, occasionally, by some global leaders and organisations. Since the first Kashmir war in the aftermath of the subcontinent partition, the agenda for resolution (in accordance with their respective goals and objectives) was accompanied by mutual Indo-Pakistani accusations of dishonesty and reluctance to genuinely engage in peace-building initiatives. These conflicting narratives formulated around the 'us' versus 'them' framework remain persistently anchored in the ideologically motivated rivalry, with largely limited prospects for any notable shift. Additionally, civilian and military leaders of both states assumed the right to play a decisive role in determining the future status of the former Princely State of Jammu and Kashmir (PSJ&K), and they usurp the privilege to debate both internally and internationally about its inhabitants' fate and wishes. On a political level, this incessant bilateral jostling has dominated the entire discourse on Kashmir resolution and pushed aside the actual plight of the civilian residents of Kashmir and human rights violations on both sides of the border.

The Kashmir imbroglio and other disputes between India and Pakistan cannot be resolved militarily without launching overwhelming chaos and destruction to both states. Furthermore, all revisionist attempts to alter the existing *status quo* in Kashmir by using force undertaken (by Pakistan) over the last seven decades, failed,[1] and we may assume they will continue to do so. Paradoxically, being militarily weaker, Pakistan was at the same time particularly inclined to employ forcible solutions to materialise its territorial claims in Indian-administered Jammu and Kashmir (IaJK) throughout the history of the dispute. It is highly unlikely that Pakistan will be able to wrest Kashmir from India's administration and *vice versa*, India will not gain control over Pakistani-administered Jammu and Kashmir (PaJK). Engaged in the continuous tussle, both India and Pakistan have conveniently ignored the wishes and aspirations of the physically and militarily divided people

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of Jammu and Kashmir.[2] At the same time, Pakistan incorporated into its ideology the concept (advocating only a pro-Pakistani option for the Indian-administered chunk) of 'the right to self-determination of Kashmiri people'.[3] Meanwhile, India's leadership persistently projects its policy vis-à-vis Kashmir as a manifestation of concern over the well-being of Kashmiris and the will to provide multidimensional development of the region. Both states use their self-serving, despotic administration over the disputed region to materialise their paramount strategic objectives. By the same token, the residents of both chunks of Kashmir are denied their fundamental, constitutionally guaranteed rights, even when compared with other citizens of India and Pakistan.[4]

15.1 The international community: supporting the resolution and providing arms

Contemporary protracted conflicts are driven by multiple endogenous and exogenous factors; they are not restricted to directly involved adversaries but constitute a fundamental element of regional security system, where the strategic interests and rivalries between the major global players overlap. The competitive relations and diverse goals of the United Nations Security Council (UNSC) permanent members (particularly the world's major competitors: the United States, China and Russia) are persistently discernible components of contemporary security dynamics. Expanding regional influence by providing patronage and arms to undemocratic leaders not only escalates regional conflicts and shields human rights violators from accountability, but also directly contributes to the fact that the Security Council is often regarded as ineffective in conflict management and resolution.[5]

All permanent members of the UNSC share interest in strategic dynamics in the subcontinent not only because of the potential (very limited) risk of a calamitous, nuclear war, but primarily because they are directly engaged in military and economic alliances with South Asian antagonists. The Kashmir dispute is one of the many conflicts that have been handled by the UNSC, which, according to the UN Charter, has the primary responsibility for the maintenance international peace and security. India and Pakistan have referred to the UN since the conflict started, thus accepting the role of international mediation in its resolution and authorising the organisation to pass relevant resolutions. The crucial UNSC Resolution No. 47 which, like others that followed, referred to 'the India-Pakistan Question', highlighting the two sides of the conflict. Adopted on 21 April 1948 (UNSCR 47), it called for a free and impartial UN-supervised plebiscite, where all subjects of the State regardless of creed caste or party could freely express their views, without coercion, bribe or intimidation. Two options for the future status of Kashmir: accession either to India or Pakistan were mentioned. Clause 7 of the Resolution stipulated: 'the Government of India should undertake that there will be established in Jammu and Kashmir a Plebiscite Administration

to hold a plebiscite as soon as possible on the question of the accession of the State to India or Pakistan'.[6] Contrary to the Resolution's pronouncements, the military presence in Kashmir continued unceasingly and the impartial plebiscite was never held, which should be of no surprise.[7] Pakistan did not withdraw its forces, which gave India the pretext to renege on its commitment to hold a plebiscite. Since Pakistan remained reluctant to vacate the territories it controlled, India rejected the plebiscite, and the *de facto* division of the state has never been reversed. Rahul Roy-Chaudhury (2008: 343) claims that the entire state to which the resolutions apply no longer exists, since the *status quo* in LoC and CFL (Cease Fire Line) changed considerably. Notwithstanding the accuracy of this statement, a thorough assessment of both states' past and current policies towards Kashmir[8] enables to conclude that there is practically no chance for the impartial plebiscite in the erstwhile PSJ&K to be held in the foreseeable future.

In the last decades, the world started acknowledging that Kashmir imbroglio is an escalation-prone flashpoint, which may pose a threat to the international security on the global level. It was the acquisition of nuclear capabilities by India and Pakistan (they both conducted tests in May 1998,[9] making a turning point in the conflict dynamics), and the growing threat of transnational terrorism, which largely contributed to the recognition of Kashmir as volatile and unpredictable security threat. Shortly after the Indo-Pakistani Kargil war fought in 1999 within sight of the LoC in Kashmir, the world was compelled 'to shift its gaze to Kashmir's acquired potential for triggering a nuclear holocaust'.[10] Pakistan's policy of asymmetric warfare by financing, training and using Islamic fundamentalist groups as proxies in IaJK, boosted in the aftermath of the Soviet withdrawal from Afghanistan in 1989, gave Kashmir issue another frightening international connotation—as a theatre for terrorist activities.

The powerful international actors, democracies and authoritarian regimes alike on the one hand manifest their commitment to the conflict resolution and peaceful subcontinent, on the other, as major arms suppliers, they directly contribute to the arms race, systemic militarisation of Indo-Pakistani interactions, which result *inter alia* in human rights violations in both chunks of Kashmir. Perceived security threats, bilateral and those stemming from regional dynamics (Sino-Indian competition, Afghanistan's uncertain future), prompt both South Asian rivals to invest much resources in arms procurement. According to the Stockholm International Peace Research Institute (SIPRI), India is the world's third-highest military spender (in 2018 it was fourth) and Pakistan holds 24th (in 2018 19th) position in the list of 40 countries with the highest military expenditure in 2019.[11] The report highlighted that between 2010–2014 and 2015–2019, arms imports by India and Pakistan decreased by 32 and 39%, respectively, yet they remain largely dependent on imports and have substantial orders and plans for imports of all types of major arms. India remained the world's second-largest importer of major arms in 2015–2019 and accounted for 9.2% of the global total and

Pakistan remained the 11th largest with 2.6% global share of arms imports. Russia accounted for 56% of Indian arms imports in 2015–2019, compared with 76% in 2010–2014. Israel, France and the United States increased their arms exports to India.[12] Over the last years, the United States has become increasingly reluctant to provide military aid or sell arms to Pakistan due to its incessant support to the Islamic terror groups (Pakistani 'Deep State' had been doing so for decades, yet American administrations kept providing military aid when they considered it strategically beneficial). Islamabad faced enhanced criticism from Donald Trump's administration; Pakistan was repeatedly accused of not doing enough in this regard and its establishment is blamed for providing safe heavens to Afghan insurgent groups such as the Haqqani Network, which is designated as a Foreign Terrorist Organization. The United States largely suspended security assistance to Pakistan in January 2018 with some limited exceptions essential for US security interests. Total security-related assistance fell from over $300 million annually in the previous years to $23 million in 2018 and only $22 million requested for the fiscal year 2020.[13] The US arms exports to Pakistan also fell considerably: Americans accounted for 30% of Pakistan's arms imports in 2010–2014 but for only 4.1% in 2015–2019. China became the key source, accounting for 74% of arms supplies in 2020 (51% in 2010–2014, 61% in 2011–2015[14]), followed by Russia with 6.6% and Italy 5.9%. In 2019, when the cross-border attacks intensified, Pakistan 'reportedly used combat aircraft imported from China, equipped with Russian engines, and combat aircraft from the USA supported by airborne early warning and control aircraft from Sweden. India reportedly used combat aircraft imported from France and Russia, guided bombs from Israel and artillery from Sweden'.[15] In 2020, Pakistan remained the main recipient of Chinese arms and accounted for 38% of Chinese arms exports in 2016–2020.[16] American withdrawal from Afghanistan in 2021, confirmed by President Joe Biden, may further bolster Pakistan's strategic ties with China, with Islamabad hoping to broker cooperation between Beijing and investments-yearning Kabul. With persistent threats and hostilities in the region, India's and Pakistan's arms imports are expected to increase over the coming years.[17]

In the years 2014–2019, the five largest weapons suppliers, most of which also 'cover' South Asia—the United States, Russia, France, Germany and China—accounted for 76% of all arms exports globally.[18] Noticeably, all (apart from Germany) are permanent members of the UNSC. The chief ethical question arises here (and in case of other global flashpoints) with regard to a purportedly genuine peace-building commitment of these decidedly influential members of the international community, irrespective of their democratic credentials or lack of thereof: are these states genuinely interested in de-escalating arms race and resolving the protracted conflicts which bring so many profits to their establishments and economies?

At the same time, the international community, including the governmental organisations and individual states, occasionally emphasises that the

Kashmir dispute needs to be addressed effectively at an international level. The UN has made some attempts to highlight and internationalise the issue and called for cessation of hostilities whenever the conflict escalated, yet India's bilateralism-based stance, accentuated especially after 1972 Simla Agreement, has considerably influenced the international approach towards the conflict resolution. In the aftermath of the escalation of the anti-India revolt in Kashmir in 1989, accompanied by Pakistan's proxies-inflicted *jihādism*, unprecedented militarisation of Kashmir and significant deterioration of human rights situation, the conflict received a wider critical international coverage. Among the recent attempts to discuss the issue, the two reports which refer to the situation on both sides of the border should be specifically highlighted. On 14 June 2018, the Office of the United Nations High Commissioner for Human Rights (OHCHR) published its landmark, first ever report depicting human rights violations in Indian and Pakistani-administered chunks of Kashmir.[19] It confronted the dominant narratives on HR abuses being committed mostly on Indian side and enumerated multiple examples of the violations both in IaJK and PaJK. The conclusion regarding potential conflict resolution highlighted the necessity of addressing HR and the inclusion of local communities: 'any resolution to the political situation in Kashmir should entail a commitment to ending the cycles of violence and accountability for past and current human rights violations and abuses committed by all parties and redress for victims. Such a resolution can only be brought about by meaningful dialogue that includes the people of Kashmir'.[20]

In July 2019, a 43-page update of the human rights covering the situation between May 2018 and April 2019 in IaJK and PaJK was published. It pointed out that neither the Indian nor the Pakistani government had addressed the problems raised in the previous report, all OHCHR's recommendations remained valid and were reiterated in the new one. The document recommends (but not obliges) India and Pakistan to 'fully respect international human rights law obligations' in their respective parts of Kashmir. Just as a year earlier, India rejected the new report claiming it was 'fallacious, tendentious and politically motivated'.[21] New Delhi accused Pakistan of fomenting the conflict and argued that the report did not mention cross-border terrorism which it claimed was at the 'heart of the issue'. Significantly, the report took into consideration the establishment of a commission of inquiry to carry out an independent international investigation into human rights violations in Kashmir. Such a commission, consisting of impartial, international experts on international law, human rights and the specificity of South Asian politics, should have prerogatives permitting it to collect on the ground information in all parts of Jammu and Kashmir. Only in such circumstances could it fulfil two crucial tasks: (1) provide relevant information regarding the current situation in IaJK and PaJK with precise data regarding the military, paramilitary and militant presence and thorough analysis of the governments' current politics vis-à-vis their administered parts, (2) constitute

a significant component of the de-escalation process which should engage Indian, Pakistani and representative leadership from all pieces of the former PSJ&K. This would, however, require cooperation from the Indian and Pakistani sides, or at least their approval that the investigators enter the region. The Sri Lankan case shows that the countries concerned may ignore UN resolutions and effectively thwart such inquiry attempts: the UN Human Rights Council' investigators entrusted with the task of probing accusations of war crimes were barred entry by President Mahinda Rajapaksa in August 2014, which effectively stalled the investigation process.

Apart from the UN, other international organisations, NGOs, or states have expressed their stance on Indo–Pakistani relations and the resolution of the Kashmir dispute. In April 2007, the European Parliament issued a 24-page 'Report on Kashmir: Present Situation and Future Prospects'. It referred to both parts of Kashmir and highlighted the necessity of engaging its inhabitants in the peace process. Noticeably, it offered the EU's support in this endeavour: 'resolution of the continuing conflict along the LoC can best be achieved jointly by a constant engagement between the governments of India and Pakistan, *involving the peoples of all parts of the former princely state;* (italics—A.K.); nevertheless [the European Parliament] thinks that the EU may have something to offer based on past experience of successful conflict resolution in a multi-ethnic, multinational, multi-faith context; therefore offers the present resolution and any meetings that may come out of it as part of a shared experience from which the EU can also learn; reiterates the importance of continued EU support to both India and Pakistan as they implement the 2004 peace process'.[22] Shortly after Jammu and Kashmir bifurcation, on 29 October 2019, 27 members of the EP (MEP's) visited the Kashmir Valley at the invitation the Indian authorities (through a little-known NGO). Regrettably, this was an event fully curated by the Indian government. It questioned India's democratic credentials rather than gave an opportunity for objective collection of information on the ground. Most of the invited MEPs represented the far right and Islamophobic parties and were used by India to project its stance on Kashmir claiming the 'wellbeing' of the Valley's residents.[23]

Some of the most prominent NGO's make regular attempts to highlight the necessity of Kashmir conflict resolution. In 2019, Human Rights Watch referred to the aforementioned UN documents; the watchdog's authors seemed hopeless, pointing out that Indo-Pakistani tit-for-tat relations showed 'no signs of improvement'.[24] Following the abrogation of Article 370 by India, Kumi Naidoo, Amnesty International's Secretary General, urged the international community to take up the issue and seek a human rights-oriented resolution, arguing that the residents of Jammu and Kashmir 'should not be treated as pawns in a political crisis, and the international community must come together to call for their human rights to be respected'.[25]

The HR watchdogs annually assess the political processes in India and Pakistan; it can be assumed that growing autocratisation in both

states has a direct impact on constructing more bellicose narratives which further preclude both rivals from potential rapprochement. The annual Democracy Index (DI), published by The Economist Intelligence Unit, which provides information on world democracy, classifies the states as full democracy, flawed democracy, hybrid regime or authoritarian regime. The 2020 issue announced a global democratic deterioration, the worst since 2006, when the index was published for the first time. The DI reports illustrate domestic dynamics in India and Pakistan, with the former being assessed as flawed democracy, the later—transforming within investigated period from army ruled authoritarian state into a hybrid regime.

As Table 15.1 shows, India reached its best result in 2014 just before Narendra Modi came to power, but since then it fell significantly (from 27 to 53 position) in and the difference in overall score (which is more indicative of the state's actual result than global rank position) is noteworthy.

Pakistan's position has not changed much in the investigated period, oscillating between 113th (3.92) and 104th position (4.55), yet, after the end of General Musharraf's military rule, its rank was elevated from authoritarian to hybrid regime. The discrepancy between India and Pakistan has decreased markedly since 2014. Nonetheless, Pakistan's classification as a hybrid regime (which retains the features of a praetorian state, with powerful role

Table 15.1 Democracy Index dynamics in India and Pakistan 2006–2020[26]

	Country	
Year	***India*** *Global Rank; Classification; Overall Score*	***Pakistan*** *Global Rank; Classification; Overall Score*
2020	53; FD[a]; 6.61	105; HR[b]; 4.31
2019	51; FD; 6.90	108; HR; 4.25
2018	41; FD; 7.23	112; HR; 4.17
2017	42; FD; 7.23	110; HR; 4.26
2016	32; FD; 7.81	111; HR; 4.33
2015	35; FD; 7.74	112; HR; 4.40
2014	27; FD; 7.92	108; HR; 4.64
2013	33; FD; 7.69	107; HR; 4.64
2012	38; FD; 7.52	108; HR; 4.57
2011	39; FD; 7.30	105; HR; 4.55
2010	40; FD; 7.28	104; HR; 4.55
2008	35; FD; 7.80	108; HR; 4.46
2006	35; FD; 7.68	113; AR[c]; 3.92

a FD = flawed democracy.
b HR = hybrid regime.
c AR = authoritarian regime.

Source: Data compiled by author from the Economist Intelligence Unit, Democracy Index (DI).

of the army) and its unchangeably much lower place in global ranking still indicate serious gap between these two states regarding the general assessment of democracy quality. In 2006, with Pakistan considered an authoritarian state under the military regime, the gap was even deeper. Nonetheless, it needs to be emphasised that it is during the Musharraf era, the two countries experienced significant rapprochement. The post-2001 geostrategic dynamics was an interesting manifestation of how, when necessary from the point of interest of external powers, their pressure can decisively influence a de-escalation of Indo-Pakistani conflict, by encouraging *détente*. Following the 9/11 World Trade Center attacks, when the US-led so-called war on terror was launched in Afghanistan and United States needed Pakistani support and relatively peaceful subcontinent, the relations between India and Pakistan considerably improved and the composite dialogue was re-launched.

The global powers unwillingly take up any serious initiative which could facilitate conflict resolution and rather abstain from open criticism with regard to human rights abuses in both chunks of Kashmir.[27] Washington puts efforts on de-escalation of the conflict, especially when tension-free Indio-Pakistani interactions are strategically crucial in particular moment. Not having any interest in such scenario, the US has never expressed support for Pakistani territorial claims or for freedom/independence aspirations of some residents of the former Princely State.[28] Conspicuously, Washington welcomed the 1972 Simla Agreement, which enabled India to successfully materialise its strategic objective of projecting conflict as a bilateral issue. Accordingly, the Americans excluded themselves from the mediation in Kashmir, suggesting bilateralism (in accordance with Indian narrative) and the United Kingdom followed the path. American historian and Indologist, Stanley Wolpert (2010: 94), urged the United States (then under the Obama administration) to engage more in supporting the resolution of the conflict, which he perceived as the most tragic catastrophe in post-partition South Asia.[29] In 2019, after New Delhi abrogated Article 370, Obama's successor Donald Trump ruffled India's feathers by offering his mediation in tackling Kashmir (allegedly at Modi's request). It set off a political storm: New Delhi vehemently denied Trump's allegations as third-party mediation is categorically unacceptable to India, contrary to Pakistan, which welcomed the idea. The US State Department quickly downplayed Trump's cumbersome remarks by confirming that Washington is 'ready to assist', but Kashmir remains a bilateral issue. Due to geostrategic considerations (India as key regional ally in containing expansionist China), the likelihood that Washington under Joe Biden's administration offers mediation and abandons bilateralism-based approach vis-à-vis Kashmir resolution is next to zero.

The UK's stance on Kashmir conflict remains unchanged and supports the bilateralism stipulations incorporated in Simla Agreement. Nonetheless, since the OHCHR reports came to light and India annulled Kashmir's autonomy, the core politicians attach more attention to the HR issues: Minister of State for Asia, Nigel Adams, expressed concern for the

HR violations in IaJK and PaJK. In a cross-party debate on political situation in Kashmir in January 2021, he stated that London will not engage in the bilateral matter, but he accentuated the necessity of lifting restrictions in IaJK, imposed after the bifurcation. He diplomatically added that lasting resolution has 'to take into account the wishes of the Kashmiri people'.[30] Many British MPs have significant Kashmiri diaspora constituency bases, and therefore, they engage in organising Kashmir debates. In the pre-Brexit era, they were regularly held also in Brussels. In the aftermath of the UK's departure from the European Union, Kashmiri activists, those advocating India's or Pakistan's stance, or secular, independent Kashmir, are likely to lose part of a discursive platform in the European institutions. Within the UK, the House of Commons Library, an independent research and information unit which provides information for Members of Parliament regularly publishes briefings on the situation in Kashmir. The 2018 report argued that 'the response of the Indian authorities to the upsurge of protest and violence since July 2016 shows that they continue to prefer military responses to a political solution in Indian-administered Kashmir'.[31] The update published in January 2019 reiterated the previous statements and argued that international community will not engage in the conflict resolution: 'there seems little international anxiety that this festering dispute might trigger another full-blown conflict between India and Pakistan, two nuclear weapon states'.[32] The document quoted the *Washington Post* arguing that 'the world no longer cares about Kashmir'.[33]

China, a growingly influential actor in South Asia, is directly engaged in the Kashmir conflict dynamics, as it controls parts of the former PSJ&K (Aksai Chin captured in the aftermath of the 1962 war with India and Shaksgam Valley, which was ceded to China by Pakistan in under the 1963 boundary agreement). Historically, the Chinese leaders advocated the idea of conflict resolution 'in accordance with the will of the Kashmiris'[34] but were reluctant to engage militarily in Pakistan's persistent campaigns in Kashmir. China merely provided verbal support for Pakistan, for example in the 1965 war: during the Zulfiqar Ali Bhutto-Chen Yi meeting in Karachi, the Chinese foreign minister supported Pakistani 'just action' and disparaged India's 'armed provocation' in Kashmir.[35] In the 21st century, another layer of complexity is marked by China's rise and great power aspirations combined with its assertiveness in pursuing its geostrategic objectives. These are manifested by the multibillion-dollar infrastructure investment, the Belt and Road Initiative (BRI) and its flagship project, the China-Pakistan Economic Corridor (CPEC), a network of highways, railways, oil and gas pipelines, which transits Pakistani territory, including the disputed Gilgit-Baltistan (GB).[36] While infrastructure is badly needed in Pakistan, lack of transparency regarding its implementation raises questions about the actual results of the corridor. Moreover, the anticipated profits from the CPEC and from the cooperation with China have provoked the Pakistani decisionmakers to promote one acceptable political narrative,

which does not sufficiently encourage the impartial analysis of potential negative (economic, sociopolitical, environmental) impact of the project. There is a need of the independent, transparent investigation of its impact on the situation in volatile regions, where the CPEC is often contested by local communities who claim they are excluded from managing their resources and regard the project as imposed by the ruling elites. This practice may reinforce corruption and authoritarian style of governance based on rigid centralised control, violation of civil rights and constitutional freedoms. Additionally, Pakistan may not only fall into a debt and liabilities trap (like Sri Lanka), but economic and, consequently, geostrategic dependence; a corridor dubbed as 'game-changer' may result in developing excessive asymmetric ties with Beijing. Investing in multidimensional cooperation with Pakistan, China wants to avoid a full-fledged armed conflict between the South Asian rivals, and at the same time continues its strategy of containing India. Potential reconciliation between India and Pakistan is not in the PRC's interest. It might diminish China's regional clout and arms sales to Pakistan and, once the conflict is resolved with future status of the former PSJ&K determined, it could result in Beijing losing control over the chunks of the erstwhile PSJ&K it controls, which are pivotally located and strategically crucial for China.[37] Following Kashmir's bifurcation in 2019 and establishing the UTL (which, according to India, should include China-held Aksai Chin) at the disputed Sino-Indian border, China raised the issue at the UN General Assembly referring to it as conflict from the past where no unilateral actions should change the status quo. In 2020, Indian and Chinese troops engaged in confrontation along the disputed border, turning the Line of Actual Control in Ladakh into another escalation-prone flashpoint.

15.2 India, Pakistan, Kashmir: selected noteworthy resolution initiatives

All efforts aimed at settling the Kashmir conflict which have been so far undertaken, failed. Mutually exclusive stances were not softened in bilateral discussions and the international community was unable to address the issue efficiently. Since the conflict's commencement in 1947, bilateral Indo-Pakistani initiatives aimed at its resolution have been held in a general atmosphere of discord and rivalry. Several meetings held in 1953–1954 which included Prime Ministers Jawaharlal Nehru and Muhammad Ali Bogra accentuated the necessity to hold a plebiscite in Kashmir, yet both sides did not materialise this pledge and India soon abandoned the idea. When Pakistan allied with the West and joined the anti-Soviet defence agreements (SEATO in 1954, CENTO in 1955), which was tantamount to receiving military support from the United States, India broke the negotiations. Following the Sino-Indian war of 1962 (Aksai Chin was captured by China) and pressure from the United States, the Indo-Pakistani talks were revived, but the attempts led by Zulfiqar Ali Bhutto (representing General Mohammed Ayub Khan's regime) and

Swaran Singh[38] who represented Jawaharlal Nehru in early 1960s were primarily a manifestation of irreconcilable positions of the two countries. The sudden death of Nehru on 27 May 1964, which abruptly ended the bilateral Nehru-Ayub Khan negotiations planned for June that year, directly influenced the conflict trajectory.

The escalation-prone dynamics, armed conflicts fought specifically over Kashmir (1947, 1965, Kargil war in 1999) and multiple bilateral tensions and cross-border skirmishes significantly derailed negotiations. Nonetheless, certain continuity in the peace process between India and Pakistan can be observed since 1997, when the Composite Dialogue Process (CDP) was proposed by Indian Prime Minister Inder Kumar Gujral and his Pakistani counterpart Nawaz Sharif on the sidelines of the SAARC summit in Male. Settling all disputes through peaceful bilateral negotiations was one of the Gujral Doctrine principles. In 1998, India and Pakistan recognised eight most vital elements of the structured peace process. They included the Kashmir issue, terrorism (fragile issues for India and Pakistan, respectively, which both states agreed to include as a demonstration of compromise), Siachen, Wullar Barrage/Tulbul Navigation Project, Sir Creek, economic and commercial cooperation and promotion of friendly exchanges in various fields.[39]

The structure of dialogue and reconciliation framework between India and Pakistan includes three tracks (*vide supra*, §14.3), generally adopted as problem-solving *modus operandi* of international conflict resolution, which involve various frameworks of interactions and initiatives, involving different types of actors to discuss political, strategic, economic and sociocultural aspects of peace process. In case of Indo-Pakistani dialogue, similarly to other international initiatives on durable conflicts, Track I engages top leadership, Track II middle leadership, Track III, particularly crucial, involves grassroot talks with inclusion of local leadership. Track I talks launched throughout the conflict's history engaged the international community and Indo-Pakistani leadership. The most notable pillars worth to enumerating are the UN mediation, the mentioned above Bhutto-Singh six rounds of talks (December 1962–May 1963), the Tashkent Agreement with the USSR engaged in mediation (1966), the Simla Accord (1972),[40] the Lahore Declaration (1999) and the Agra summit of 2001.[41] Agra meeting was followed by abrupt escalation and Indo-Pakistani 2001–2002 military stand-off in the aftermath of 13 December 2001 terrorist attack in Indian Parliament, carried out by Pakistani-backed terrorist groups LeT and JeM.

In 2003–2005, under the pressure of the United States, which engaged Pakistan in its 'war on terror' in Afghanistan, and urged peaceful subcontinent and dismantling of terror outfits by the then Musharraf regime, the composite dialogue between India and Pakistan was resumed with substantial results. The Track II talks and the CDP resulted in launching the first cross-LoC bus service (the 'Caravan of Peace'),—a momentous initiative to initiate formal people-to-people contacts between IaJK and PaJK. Yet, the service was limited and it was difficult to get a permit to cross the border.[42] In 2008, the

cross-LoC trade commenced, another turning point in the peace process. Cross-LoC travel and trade restored Track III people-to-people contacts which provided the local population an opportunity to revitalise the economic and sociocultural linkages, which had been sharply cut in 1947.[43]

In 2003, India and Pakistan negotiated a ceasefire; Kashmir-specific talks intensified when the composite dialogue was re-launched in 2004–2005.[44] Unfortunately, terrorist attacks in Mumbai in November 2008 perpetrated by LeT significantly aggravated the situation; since then the genuine composite dialogue has not been resumed. In the second decade of the 21st century, the tensions across the border re-escalated. The LoC regularly witnesses ceasefire violations (CFVs) with cross-border shelling which threaten the lives and destroys properties of the civilians on both sides of the border. Following the abrogation of Kashmir's partial autonomy in August 2019, the CFVs increased and it continued throughout 2020. India accused Pakistan of increased infiltration attempts from *jihādist* camps across the border as the reason for the spike in CFVs, while Pakistan alleged that India committed CFVs to divert the world's attention from its HR violations against Kashmiris and Muslims throughout India.[45] The United Nations expressed concern that the violence might exacerbate the HR situation, but at the same time its Secretary General António Guterres published a statement through his spokesperson, in which he refused to engage in mediation, appealed to India and Pakistan for restraint and cited the guidelines of the Simla Agreement on bilateral conflict resolution by India and Pakistan.[46] The uncompromising Simla bilateralism, endorsed by India, seems incessantly to excuse the passivity of the international community in engaging in the conflict de-escalation and resolution.

Pakistan's continued proxy strategy and support for militant groups, including Kashmiri Islamists, have a detrimental effect on the potential negotiations and conflict resolution. Furthermore, being unachievable and resource-costly, such strategy is in fact counterproductive to Pakistan's national interests. So is the selective approach of Pakistani decision makers in tackling the radicals. This attitude jeopardises the state's internal security and poses an existential threat to Pakistan itself. The authorities seem to neglect this threat and there is no proper cooperation between the civilian and military leaders as their counterterrorism approaches differ; it is the powerful military establishment that *de facto* controls foreign policy and upholds its proxy policy against India. Tackling the terrorist threat is one of the major challenges in Indo-Pakistani relations and a major hurdle to rapprochement. Facing this challenge should include not only talks but also intelligence sharing in order to prevent terrorist attacks in the future. Conspicuously, both neighbours are impacted by terrorism. In Global Terrorism Index 2020, Pakistan and India hold 7th and 8th positions, respectively (an improvement since 2010, when Pakistan was the 2nd and India the 4th).[47]

Throughout the history of the Kashmir conflict, there have been many proposals of its resolution put forward by India, Pakistan, international experts

and representatives of Kashmir (including the diaspora). The frameworks for these proposals evolved primarily from historical, geographical and communal specificity of the disputed region and from both states' strategic objectives. Different formulas presented the opinions of international experts, illustrated the objectives of various stakeholders in particular geostrategic circumstances of the subsequent decades and reflected diverse interests of the parties involved in the conflict. A glimpse into selected multitrack frameworks, proposals for peace process, formulas and initiatives launched by the leadership, official representatives, political activists, civil society, NGO's, etc., is offered below:

1 **The Chenab formula**, which was discussed for the first time in 1962–1963 during the bilateral Indo-Pakistani talks (Bhutto-Singh rounds of talks) facilitated by the John Fitzgerald Kennedy administration. The idea was to use the Chenab River as a natural geographical boundary and a dividing line of the state between India and Pakistan.[48] A.G. Noorani quotes Sartaj Aziz (the then Pakistan's Foreign Minister) who recalled the discussions on Kashmir at the turn of the centuries, during the backchannel dialogue which preceded the Lahore Summit in 1999. It was discussed during Track II level talks between the representatives of Nawaz Sharif and Atal Bihari Vajpayee governments. The proposal was based on the fact that all the Hindu majority areas were west of the Chenab and the Muslim majority regions were east of the river. According to 'the Chenab formula', the area east of Chenab and Ladakh would be administered by India. AJK and the Northern Areas (now GB) would be held by Pakistan and the Valley would be given maximum autonomy (minus defence and foreign affairs).[49] Indian chunk of Kashmir would be therefore, divided, with India's territorial concessions; for Pakistan, such solution was more acceptable. Implementation of this formula would be tantamount to the (false) supposition that the dispute over Kashmir is a communal, not political conflict. Based on a religion-oriented approach, the Chenab formula could further disintegrate and polarise Kashmir. Reluctant to accept Kashmir's division and creating a new cease-fire line on the Chenab River, Kashmiri separatist leaders from the APHC (All Parties Hurriyat Conference[50]), including the Jammu and Kashmir Liberation Front (JKLF) leaders (Amanullah Khan), rejected it in May 2003 by claiming it was 'imposed from the outside', and thus, unacceptable.[51]
2 **India-Pakistan Neemrana**[52] **Initiative**, one of the oldest frameworks for Track II middle leadership people-to-people dialogue, was initiated in 1991–1992 with the support of *inter alia* Ford Foundation to generate opportunities to exchange ideas and prepare research papers regarding the Indo-Pakistani peace process. It engaged former diplomats, scholars and military personnel from both countries. In 2004, Neemrana Group had regular meetings when the Indo-Pakistani dialogue was launched. The Group discussed, for example, Kashmir resolution with Andorra[53] as a model (a parliamentary co-principality where

France and Spain jointly manage its security and defence related issues, but provide independent constitution and internal autonomy). The Neemrana Track II talks were shortly resumed in April 2018.

3 **Pakistan-India People's Forum for Peace & Democracy (PIPFPD)** a noteworthy non-governmental, inclusive initiative formally launched in New Delhi in November 1994, following initial talks held in Lahore and joint statement 2 months earlier. In Lahore, the delegates from India and Pakistan expressed the urge to denuclearise the subcontinent, reverse the arms trade, curb religious intolerance which undermines democracy. They also came up with the Kashmir resolution initiative and Indo-Pakistani reconciliation, assuming that Kashmir is not just a territorial dispute between Pakistan and India, therefore a peaceful democratic solution must include the peoples of Jammu and Kashmir.[54] One of its founding members was Ibn Abdur Rehman,[55] a prominent Pakistani peace and human rights advocate (since 1990 director and secretary general of the Lahore-based Human Rights Commission of Pakistan, HRCP).

PIPFPD initiative brought together Indian and Pakistani citizens from different walks of life: intellectuals, activists, trade unionists, lawyers, artists, etc., who wanted to enable better people-to-people contacts and launch a discussion on democracy and peace initiatives. The delegates rightfully contended that the protracted tensions between India and Pakistan were intentionally exacerbated by both establishments 'in utter disregard of the common interests and aspirations of the peoples of the two countries'.[56] The PIPFPD organised several conventions attended by the representatives of both states, with the first landmark meeting attended by more than 200 participants (according to Kutty 2004: 47, it was the largest gathering of the Indian and Pakistani citizens since the partition) held in February 1995 in New Delhi. The delegates formulated their stance: (1) the confrontation failed to bring any benefits to Indians and Pakistanis, (2) the citizens of both countries want genuine peace and urge the governments to respect their wishes, (3) peace is a necessary step to reduce communal and ethnic tensions on the subcontinent and will provide economic and social progress, (4) India and Pakistan must sign an unconditional no-war pact, (5) democratic settlement of Kashmir is essential for peace promotion.[57]

The PIPFPD encouraged non-governmental activism and multiple other initiatives and events were launched thereafter, for example the first-ever Pakistan Peace Conference in Karachi on 27–28 February 1999, Women's Initiative for Peace in South Asia (WIPSA) launched in the 2000s. The New Delhi-based Centre for Dialogue and Reconciliation launched intra-Kashmir dialogue with seventeen cross-LoC conferences between 2005 and 2015.[58]

4 **Kashmir Study Group (KSG) proposal.** A US-based KSG, first founded in 1996, by 2005 was composed of American, European and regional (including those from J&K on both sides of the LoC) members with

strategic, diplomatic and academic background. It conducted numerous meetings with interested sides and came up with several reports, including the relatively detailed proposal (titled *Kashmir—A Way Forward*) in 2005. It assumed transforming the parts of the erstwhile PSJ&K into self-governing entities with their own democratic constitution, citizenship, flag, legislature (apart from defence and foreign affairs) and unrestricted access from India and Pakistan. Kashmir, Jammu and Ladakh were supposed to be established on Indian-administered side, and two entities—AJK and Northern Areas (now GB)—were to be established on Pakistani side. Their residents would be guaranteed free movement within Kashmir, borders of the entities with India and Pakistan were supposed to be open for transit of people, goods and services. An All-Kashmir body, consisting of the representatives from all five entities body as well from India and Pakistan, was planned to be established to provide a platform for inter-entities collaboration and coordination of the problems related to the trade, transportation, tourism, water resources, environmental challenges. Importantly, this formula includes the right of the displaced persons, including Kashmiri Pandits, who left any portion of the J&K entity, to return to their homeland.[59]

5 **The 'Two plus six' formula.** On 19–23 June 1997, the foreign secretaries of India and Pakistan (Shamshad Ahmed and Salman Haider) met in Islamabad and confirmed the will to cooperate on contentious issues. A framework for the Composite Dialogue Process (CDP), initiated in May by both states' Prime Ministers, was discussed. The structured dialogue was supposed to be multidimensional and included eight issues which were enumerated in the fourth clause of the Joint Statement:

- Peace and security including confidence-building measures (CBMs),
- Jammu and Kashmir,
- Siachen Glacier,
- Wullar Barrage/Tulbull Navigation Project,
- Sir Creek,
- Terrorism and drug trafficking,
- Economic and commercial cooperation,
- Promotion of friendly exchanges in various fields.[60]

It was a major compromise on both sides: Pakistan resigned from focusing primarily on Kashmir as a core contentious issue in mutual relations and India agreed to include the Kashmir dispute and dialogue on its resolution to the list of topics. In September 1998, few months after the Indian and Pakistani nuclear tests and a tense atmosphere in bilateral relations, the two Prime Ministers met during at the UN General Assembly and announced the so-called two plus six formula. It separated the two most delicate issues—peace and security, and Jammu and Kashmir—from the working group at the foreign secretary level.[61] This dialogue was launched in mid-October 1998 but did not bring

much progress, as neither side was in fact willing to abandon their major goals.

6 **General Pervez Musharraf's 4-point (4-step) formula**. Offering a peaceful resolution of the Kashmir conflict with India among the top army personnel in Pakistan is an immensely rare phenomenon as it contradicts the strategic *Kaśmīr banegā Pākistān* ideology of the Pakistani 'Deep State'. Therefore, it may come as surprise that Pakistan's then military dictator, Pervez Musharraf came up with a 4-point Kashmir resolution political initiative. The General initially presented it as a 4-step proposal during the 2-day landmark[62] summit talks in Agra (14–16 July 2001, one-to-one talks between Pervez Musharraf and Atal Bihari Vajpayee), when it was proposed to acknowledge the centrality of the Kashmir conflict and to reject any proposal unacceptable to India, Pakistan or Kashmiris.

His four-point formula involved the following prerogatives:

- Demilitarisation or phased withdrawal of troops,
- No change of borders of Kashmir. However, the people of Jammu and Kashmir will be allowed to move freely across the LoC,
- Self-governance for each region without independence,
- A joint supervision mechanism in Jammu and Kashmir involving India, Pakistan and Kashmir.

In his autobiography, Pervez Musharraf portrayed himself as a leader who was determined to search for durable solutions, which could be acceptable to India, Pakistan and Kashmiris. He stressed out that while conducting the composite dialogue in 2004 and 2005 the one-to-one talks on Kashmir with the Indian leadership were the most productive. Nevertheless, both sides kept their positions on crucial issues, for example Musharraf rejected accepting the LoC as a permanent border.[63]

7 **All Parties Hurriyat Conference (APHC)—Indian government talks: a step-by-step approach**. In January and March 2004, the Indian government and Kashmiri separatists held historic, first-ever bilateral negotiations. A moderate faction of APHC renounced violence as a means to achieve their goals renunciation and decided to take part in the talks. Yasin Malik, the leader of the JKLF, a separatist organisation affiliated with the APHC, joined the delegation (he had earlier renounced violence). For hardliners (such as Syed Ali Shah Geelani), who favoured insurgency in the Valley, engaging in any consultations with India was not acceptable and they had already left the APHC in 2003, forming their own faction. Geelani argued that any roadmaps which include autonomy, self-rule, etc., crafted by mainstream political establishment are not acceptable for his faction of the APHC.[64] Abandoning the idea of tripartite talks (including Pakistan) the moderate faction decided to engage in direct talks with New Delhi. There were two rounds of negotiations, led by the then deputy of the Prime Minister, Lal Krishna Advani. The radical Islamists warned the moderates against the talks, threatening

them with death,[65] illustrating deep divisions in the approaches towards the settlement of dispute. The Indian government's stance was at that time based on the step-by-step resolution of all outstanding conflicts, which was confirmed in the joint statement released after the talks.[66] The then Indian Prime Minister Atal Bihari Vajpayee promoted the idea of engaging the moderate Kashmiri leaders in the talks. The moderates did not have enough leverage over the openly aggressive, militant Islamic groups.[67] By acknowledging that Kashmiri separatists should be involved in the peace process, India had gone beyond perceiving Kashmir as its own internal matter and conceded to the idea of Kashmir being a problem to be discussed both with Kashmiris and with Pakistan.[68] In 2019, in Kashmir under the governor's rule before J&K bifurcation, the moderate APHC chairman, *mirwaiz* (hereditary chief preacher in Kashmir) Umar Farooq, reiterated his readiness to restart the dialogue.

8 **Greater autonomy by Jammu and Kashmir National Conference Party.** The Jammu and Kashmir National Conference Party or National Conference (JKNC, referred to as National Conference, NC), one of the oldest local political parties in India, was founded by Sheikh Abdullah. It held the position of a dominant political force in the local policies IaJK for many decades. The party supported accession to the Indian Union on the premise that J&K would enjoy the inalienable right to maintain its autonomous position.[69] The party was as significant to the Valley as Congress was to India, but its dominance was successfully contested by Jammu and Kashmir Peoples Democratic Party (JKPDP).[70] The JKNC is led by Sheikh's son, Farook Abdullah, and grandson, Omar Abdullah. Both were chief ministers of J&K, the latter from 5 January 2009 until 8 January 2015. With its strong political influence in the Valley, the party was considered a challenge for the separatist narrative. The JKNC was also a target for militants due to its presence in the electoral process. Common Kashmiris expressed their disappointment and anger at the party's alliance with the Congress in 1986 and for its participation in election rigging in 1987, which is largely considered as an initial spark of the subsequent militancy. In the first decade of the 21st century, there were several attempts to kill Omar Abdullah.[71] The idea of the self-determination and genuine power for the people has its roots in the pre-Partition period when the movement, led by Sheikh Abdullah, was agitating for greater power from the then ruler, Maharaja Hari Singh.[72] Before Kashmir bifurcation, the party called for greater autonomy and self-determination and was regarded as moderate separatist.[73] On 30 October 2019, one day before Jammu and Kashmir lost its state status and was divided into two union territories (UTs), the National Conference made a vociferous appeal to the central government to shelve the plan and maintain the statehood of the '200-year-old state' dubbed as the 'crown of India'.[74] Like the former Chief Minister Mehbooba Mufti, the National Conference leader Omar

Abdullah was taken into custody. Bifurcation of J&K and cartographical changes in the political map of the newly established UTs have completely disrupted the functioning of mainstream political parties from the erstwhile state. With arrested leadership, they were practically excluded from the democratic political discourse.[75]

9 **Jammu and Kashmir Peoples Democratic Party 'self-rule'.** The Jammu and Kashmir Peoples Democratic Party (JKPDP, also referred to as Peoples Democratic Party, PDP), is another mainstream Valley-based political party. The PDP was established in 1999 by Mufti Mohammad Syed (a former member of Congress and former Union Home Minister in Prime Minster Singh's government). After his death, his daughter, Mehbooba Mufti (also a former member of Congress) became the president of the party.

The political philosophy of the party is based on the formula of 'self-rule', where the people of Jammu and Kashmir are engaged in the process of dialogue on the resolution of the conflict. The PDP's formula is based on the following principles:

- Creation of cross-border institutions,
- Economic union of the Indian and Pakistani sides of Kashmir in the future,
- Empowerment of the people of Jammu and Kashmir.

Jagmohan Malhotra (known as Jagmohan, the fifth Governor of Jammu and Kashmir in 1984–1989 and in 1990, an author of *My Frozen Turbulence in Kashmir*) accused this agenda for 'undermining and then ending Kashmir's relationships with the rest of India'. He added that the idea of open borders and joint management would give Pakistan a decisive role in the affairs of Kashmir and ultimately absorb it in its fold.[76] According to Mehbooba Mufti, the self-rule approach is equivalent to '*de facto azādi*: from mental, political, physical siege, but without undermining the sovereignty of India and Pakistan'. Since the late 1990s, the party has promised the development of good governance (corruption-free government, unconditional dialogue with militants, support to those affected by the militancy) as a counter-insurgency measure.[77] Since the party came out with the 'self-rule' formula, the separatist groups have accused the JKPDP of being 'soft-separatist', whereas the extreme pro-Indian nationalists argue that the party policy is based on pure separatism. The JKPDP rejects these allegations by highlighting that for Indian nationalists 'genuine Kashmiri aspirations are dubbed as separatist'.[78]

The JKPDP was supportive of engaging in the talks and policy of reconciliation aimed at normalisation of Indo-Pakistani relations. To the disappointment of some Kashmiris, who were against political cooperation with Hindu nationalists, it was running a coalition government in Jammu and Kashmir with the BJP with Mehbooba Mufti as chief minister. She held this position until June 2018, when the BJP broke a 3-year

ruling coalition and India imposed a governor's rule (for the eighth time in the history[79]). Satya Pal Malik was appointed as the governor of J&K by President Ram Nath Kovind on 21 August 2018. Following the abrogation of Article 370 and J&K bifurcation, the political leadership of the JKPDP was placed under house arrest. Mehbooba Mufti accused Indian institutions of a betrayal of the Kashmiri people and India of being an occupation force in Jammu and Kashmir.

Notably, on the eve of the Article 370 abrogation, the mainstream Kashmiri parties had an all-party meeting at Farook Abdullah's Gupkar residence. They unanimously passed the Gupkar Declaration (GD), which assessed any modification of the Articles 35A, 370, unconstitutional and against the people of Jammu, Kashmir and Ladakh. In 2020, the parties formed the People's Alliance for Gupkar Declaration, led by Farook Abdullah, aimed at restoring Kashmir's autonomy.

10 **Atal Bihari Vajpayee's doctrine of IKJ**—*insaniyat, kashmiriyat & jamhooriyat*: humanity, Kashmiri identity and democracy (*insāniyat*, *kaśmīriyat* and *jamhūriyat*). It was coined in 2003 by the then BJP's Prime Minister of India, Atal B. Vajpayee, with the reconciliation-oriented aim to resolve the conflict and assure progress and prosperity in J&K. The doctrine was often invoked by some local politicians, including Mehbooba Mufti, and it gained heightened significance during Narendra Modi's premiership. Modi referred to Vajpayee's doctrine and foreign policy legacy in conceptualising India's strategic objectives, yet he did not propose any notable, peace and reconciliation-oriented initiatives vis-à-vis Pakistan and Kashmir, like Vajpayee did. Nonetheless, Narendra Modi often underscored the importance of the IKJ formula in his policy of 'better future' vis-à-vis Kashmir. For example, in July 2014 while visiting Kashmir, he pledged to carry forward the IKJ plan and declared that his aim was 'to win the hearts of the people'.[80] In practice, the IKJ formula serves rather as a framework for BJP's governance via *faits accomplits* in Kashmir, which was manifested in August 2019 the by the abrogation of the Article 370 and deconstruction of the erstwhile J&K state. The officially declared purpose of the abrogation was depicted as the way to assure multi-dimensional development in IaJK, including the Valley.

11 **The United States of Kashmir** initiative and solution proposal, advocated by the United Kashmir Peoples National Party (UKPNP, founded in 1985) representing Kashmiri nationalist diaspora (it is chaired by Switzerland-exiled Sardar Shaukat Ali Kashmiri, born in AJK). It denies India's and Pakistan's decisive role in determining the future of Kashmir and promotes the 'national liberation' of Kashmir, unification of the entire former PSJ&K into an independent, free of sectarian prejudices entity, crowned by the inception of a secular and democratic United States of Kashmir. The party is particularly critical against China's incursions in GB.[81]

Various selected proposals enumerated above illustrate the complexity of Kashmir conflict resolution and multiplicity of approaches. The recommendations refer to a plethora of challenges—from bilateral Indo-Pakistani negotiations and CBMs to providing territorial arrangements of all parts of the IaJK and PaJK. Some include geographic or communal factors as pillars of redefining the already existing borders, yet it seems that instead of transforming the divisions, often without the approval of the inhabitants of IaJK and PaJK, softening the borders should rather be endorsed to enable free cross-LoC movement.

Some elements of the autonomy-based scenario with the Andorra-like co-principality (by Indian and Pakistani civilian leadership) of jointly guaranteed autonomy in the disputed region could be in theory implemented in Kashmir, provided that certain conditions are met and meaningful compromises worked out. Azad Jammu and Kashmir and the Valley could be collectively governed by India and Pakistan with maximum autonomy, separate local authorities and constitution. The border would be softened and the families reunited with ongoing Track III discussions and support for local traders. The noteworthy KSG proposal, which comprehensively addresses all major disputed issues, could likely introduce a Kashmiri-centred solution, provided that the decision makers would be capable of reaching the consensus and working out the details of peace-building mechanisms. There is no perfect solution of the Kashmir conflict, which would satisfy all sides, but the KSG proposal of self-governing entities in all parts of the erstwhile PSJ&K deserves attention, as it could possibly be optimal from the perspective of most of its inhabitants. It was unclear, however, especially if we take into consideration the hostile approach of Indian and Pakistani leadership vis-à-vis such solution, who would be authorised to draw up the drafts of constitutions, set up procedural details of election process and most importantly how to guarantee independent and free elections and demilitarisation of the entities (another key aspect of this formula). The proposal assumed that India and Pakistan were obliged to 'work out financial arrangements for the entities', but it was not elaborated how it should be organised in terms of legal conditions and particular obligations. The residents would probably have to acquire Indian and Pakistani passports but depending on which side of LoC they lived (the Line would remain in place until further decisions), so it was restricted to the current territorial divisions. Accordingly, a person living in the entity on Pakistani side could not get the Indian passport.

Yet, leaving aside these arrangements, which could be worked out if the adversaries were able to find a compromise, realistically thinking, the autonomy blueprint is currently unfeasible as it would require a profound recalibration of political thinking of India and Pakistan, as well as reconceptualisation of their confrontational, nationalist-populist discourses towards each other and vis-à-vis Kashmir. That would have to involve mutual trust, cooperation and pivotal shift towards the intra-regional cooperation: abandoning historically inherited traumas, re-stitching South Asia

geostrategically and substantially transforming alliances with external powers (e.g. Pakistan's clientelism towards China). Other profoundly challenging solution-oriented endeavours involve all-track bilateral and multilateral dialogue with all stakeholders, initiatives aimed at state-supported, effective curbing on religiously motivated fundamentalism and communalism, minimising the adverse effects of militarisation, with accountability of those responsible for HR violations in IaJK and PaJK, and safeguarding local cultures with simultaneous support for socio-economic development.

Unfortunately, bellicose nationalisms of Indian and Pakistani establishments hurdle the re-launching of Composite Dialogue Process which could enable to discuss all pending issues. Nonetheless, there is a need to revive and develop political, non-governmental activism of both states' elites, people-to-people contacts with such valuable initiatives and proposals as those put forward by the PIPFPD. Regrettably, the February 2019 Pulwama attack in IaJK and abrogation of Article 370 by India escalated bilateral tensions and practically halted the peace process and cross-border trade/contacts. The COVID-19 pandemic outbreak accelerating rapidly,[82] further deteriorated the situation. Nonetheless, bilateral backchannel talks to reduce tensions, tackle the LoC infiltration and CFV's were held in the late 2020 and early 2021.

Notes

1. Rizvi (2009: 336).
2. Snedden (2015: 276).
3. Racine (2002: 121).
4. The residents of Kashmir in both India and Pakistan often emphasise that they are subjected to enhanced control by the security forces whenever they travel outside Kashmir, even though they are the citizens of their own respective countries. Multiple conversations conducted in India, Pakistan and Europe with the residents of the former PSJ&K or expats (all names withheld) corroborated their apprehension of being treated as dehumanized elements of the 'fragile', security-related issue or at least potentially suspicious troublemakers, not as equal citizens.
5. Bercovitch–Fretter (2004: 35).
6. UNSCR 47. More: Korbel (1954: 112–117). It has to be mentioned that the third option of autonomy or independence was also discussed, *inter alia* by the Kashmiri leaders. In June 1953, shortly before Sheikh Mohammad Abdullah was arrested, a Working Committee of his National Conference published a report with potential solutions to the Kashmir dispute. It involved the scenario of independence or joint Indo-Pakistani control over Kashmir, which should have been included into plebiscite options. This debate was later reminded by Sheikh Abdullah (1965: 533–534) in his essay in prestigious *Foreign Affairs*, where he also stressed the temporary and provisional character of Kashmir's accession to India, confirmed by the Nehru administration in the late 1940s and early 1950s.
7. Schofield (2003: xii).
8. More: Balcerowicz–Kuszewska (2022a), Balcerowicz–Kuszewska (2022b).
9. India's first nuclear test referred to as 'Smiling Buddha' or 'Pokhran-I' took place in May 1974, at Pokhran in Rajasthan. Its nuclear capabilities were developed primarily to face the threat from China.
10. Wirsing (2010: 141).

11. SIPRI (2020b: 2).
12. SIPRI (2020a: 6–9).
13. CRS (2019). The United States provided over $34.1 billion military and economic assistance to Pakistan between 2002 and 2020.
14. SIPRI (2021: 9).
15. SIPRI (2020a: 9)
16. SIPRI (2021: 5).
17. According to the report, due to delay in production of its own major arms, India is planning deliveries of combat aircraft, air defence systems, ships and submarines. Pakistan: 50 combat aircraft, 8 submarines and 4 frigates from China, and 4 frigates from Turkey, to be delivered by 2028 (SIPRI 2021: 9).
18. SIPRI (2020a: 2).
19. Khurram Parvez, a Srinagar-based renowned HR activist and a Program Coordinator of local Jammu and Kashmir Coalition of Civil Society (JKCCS) was one of the sources of information collected from June 2016 to April 2018 for an OHCHR report. He regularly suffers reprisals for his work from the Indian authorities. See Balcerowicz–Kuszewska (2022b). Following the report publication, according to the UN, defaming content against him and the JKCCS was circulated also by a group claiming to have ISIS affiliation. The radicals publicly incited death threats against Parvez and his family (GA 2018: 44–45).
20. OHCHR (2018: 47).
21. OHCHR (2019: 41–43).
22. EP (2007: 6).
23. More: Balcerowicz–Kuszewska (2022b).
24. HRW (2019: 454).
25. AI (2019).
26. The report was firstly published in 2006, with updates for 2008, 2010 and then annually.
27. On the contrary, they indirectly contribute to the arms race and militarisation of the subcontinent. According to SIPRI (2019: 2), India was the world's fourth-highest military spender and Pakistan holds twentieth position in the list of 40 countries with the highest military expenditure in 2018. A year later India took the third position, Pakistan twenty-fourth. Pakistan's spending was much more strenuous for its budget: it amounted to 4 per cent of its GDP, India's to 2.4 per cent (SIPRI 2020b: 2).
28. Koithara (2004: 130). According to him, the United States decided to remain neutral and passive once the 1962–1963 peace talks between India and Pakistan failed and both states strengthened their relations with the Soviet Union and China, respectively. It can also be highlighted that for Washington the geostrategic role of South Asia gained much more significance over a decade later, but the attention was focused on Afghanistan, not on the resolution of Kashmir imbroglio.
29. He argued: 'a permanent peaceful solution of Kashmir conflict requires solemn diplomatic agreement between India and Pakistan that have full support of Kashmir's most popular leaders'. See also Zahid (2012: 100).
30. Sonwalkar (2021).
31. Lunn (2018: 13).
32. Lunn (2019: 15).
33. Dutt (2017).
34. In the mid-1960s, Chinese Premier Zhou Enlai endorsed Pakistan's position on Kashmir and pointed out to Ayub Khan that the conflict should be resolved in accordance with the wishes of the people of Kashmir (Burke 1974: 179; Pampori 1992: 303).

35. Schofield (2003: 110–111), Ganguly (2001: 46).
36. More on the CPEC: Balcerowicz–Kuszewska (2022a).
37. Kuszewska (2012: 171–175).
38. At that time he was India's Minister of Agriculture, in 1964 he became the Minister of External Affairs.
39. Padder (2012: 1).
40. The Simla Agreement introduced the principle of bilateralism into Indo-Pakistani relations. India, adamantly defending its stance on non-internationalisation of the Kashmir issue, successfully limited the third party or multilateral initiatives, or external mediation for resolving the conflict. Sinderpal Singh (2013: 67) argues that 'Mrs (Indira—A.K.) Gandhi managed to fulfil the task that Nehru had attempted in mid-1950's, when he retracted his offer to settle the Kashmir dispute through the plebiscite to be conducted under the auspices of the UN. (…) This point of the agreement strengthened India's role as the pre-eminent state in South Asia'. India and Pakistan pledged to respect the LoC resulting from the ceasefire in December 1971 and guaranteed its inviolability.
41. Bali–Akhtar (2017: 3).
42. India and Pakistan were reluctant to enable free travel across the LoC. Bali–Akhtar (2017: 3) provides precise number of the bus passengers within ten years, till 2017: 27,907 visits, 8379 from the IaJK and more than 19,528 from the PaJK side. The authors accentuate extremely limited number of people who were permitted to travel 'in the context of the entire state population, which is 12.5 million in IaJK per the 2011 census and an estimated 4.4 million in PaJK'.
43. Bali–Akhtar (2017: 3).
44. Bali–Akhtar (2017: 3).
45. Jacob (2020: 5).
46. *Tribune* (2019-08-09).
47. GTI (2020).
48. Puri (2010: 37).
49. Noorani (2013 Vol 1: 266–270).
50. The APHC is the Valley-oriented alliance of 26 sociopolitical and religious organizations, established in March 1993. It rejects India's rule and advocates Kashmiri separatism, adhering to Pakistan's approach that Kashmir is an unfinished business of partition. Its constitution demands the right to self-determination, including the right to independence, yet accentuates the Muslim majority character of the state and promotes 'the buildup of a society based on Islamic values, while safeguarding the rights and interests of the non-Muslims'. The alliance split into a moderate and hardline factions (more: SATP).
51. *Nation* (2004-05-23).
52. The name comes from Neemrana Fort in Rajasthan, where the Track II talks took place.
53. The Andorran scheme was proposed earlier by historian Alastair Lamb (1997: 328), who highlighted that Andorra admittedly lacks the problem of decades-long separate existence and cultural differences as in case of AJK and the Valley, but that 'did not invalidate the Andorran analogy'.
54. PIPFPD (1994a).
55. In 2003, he received a German award, Nuremberg International Human Rights Award, together with Indian civil rights activist, Teesta Setalvad, who also participated in the PIPFPD and was one of the signatories of its statements. I. B. Rehman passed away in April 2021 in Lahore, which was another hard blow to Pakistani civil society and human rights activism after the demise of renowned HR lawyer Asma Jahangir in 2018.

56. Kutty (2004: 45).
57. PIPFPD (1994b).
58. Bali–Akhtar (2017: 3).
59. KSG (2005).
60. JS (1997).
61. Wirsing (2003: 17–19).
62. During this summit (which could have been historic if ended conclusively), the composite dialogue was briefly revived and all contentious issues were raised—including Kashmir, terrorism, confidence-building measures and even gradual nuclear disarmament. As often it turned out to be a failure due to mutual disagreements on crucial issues, primarily Kashmir.
63. Musharraf (2006: 301).
64. Bhan (2015: 166).
65. Behera (2006: 54).
66. *Guardian* (2004-01-22).
67. Behera (2006: 55).
68. Chowdhary (2016: 213–215).
69. Abdullah (1974: 40).
70. Rana (2006: 254).
71. HRW (2006: 135).
72. Prakash (2008: 357).
73. More: Chowdhary–Rao (2004: 1525). In February 2017, Omar Abdullah, then the opposition leader in Jammu and Kashmir Legislative Assembly, presented a speech at a panel discussion entitled 'Kashmir—Breaking the Impasse' at Harvard University in Boston, Massachusetts. 'India and Pakistan should stop trying to beat each other at diplomatic fora and claim victory but rather allow the people of Kashmir win from a peace process. Kashmiris have suffered a lot because India and Pakistan have failed to initiate a comprehensive and sustained peace process that would simultaneously facilitate dialogue at both external and internal fronts. For what Kashmiris have gone through, they deserve the uninterrupted and undivided attention of both India and Pakistan with a demonstrated intention and political will to resolve the political issue', he argued (GK 2017-02-14).
74. *Firstpost* (2019-10-31).
75. On establishing the People's Alliance for Gupkar Declaration and local elections, see Balcerowicz–Kuszewska (2022b, §6).
76. Jagmohan (2012: 795–796).
77. Tremblay (2018: 221).
78. Jacob (2013: 20).
79. The longest one was imposed following the eruption of insurgency and lasted from January 1990 till October 1996.
80. Majid (2014).
81. UKPNP.
82. In April 2021, the hashtag #PakistanstandswithIndia was trending on Pakistani social media to show solidarity with India, which suffered a massive spike of infections.

16 Current security and economic dynamics

Agnieszka Kuszewska

As the Kashmir dispute continues to be a flashpoint of international concern and a persisting source of violent tensions, its de-escalation and resolution remain a crucial challenge to be addressed in a constructive way by the direct stakeholders and the international community. There are many impediments that are likely to contribute to the lack of resolution of this protracted issue with limited prospects for any breakthrough in the nearest future. Kashmir imbroglio is far more than a territorial and ideologically constructed tussle; it is a multi-dimensional conflict, which results in numerous socio-economic challenges and involves the external actors. The strategic, security-related shifts and economic dynamics in the upcoming decade will have a direct impact on the Indo-Pakistani interactions and the situation in Kashmir.

Khurshid Mahmud Kasuri, the former Pakistani Foreign Minister (2002–2007), in his lengthy autobiography, quotes the ex-Indian Prime Minister Manmohan Singh, who said in January 2007, when bilateral peace process was in progress: 'I dream of the day while retaining our respective national identities, one can have breakfast in Amritsar, lunch in Lahore, and dinner in Kabul'.[1] As we enter the third decade of the 21st century, this wish sounds even more utopian than 15 years ago. Multiple de-escalation initiatives, including those undertaken by the UN, and more than 150 rounds of unsuccessful peace talks[2] between India and Pakistan, demonstrate the intractability of the conflict, caused primarily by lack of both rivals' willingness to resolve it. Taking into consideration the special strategic, ideological and identity-related significance Kashmir has for both states, their colonial-style policies vis-à-vis their portions of disputed territory and staunch reluctance to compromise, any concessions seem presently unattainable.

The clash between two nationalisms, boosted by majoritarian religious radicalism, and the strongly manifested aspirations of local people with its internal diversities (India, Pakistan, autonomy or independence), makes a resolution acceptable to all sides unreachable. There are a variety of discourses that shaped public opinion both in Kashmir and externally, but the dominating international narrative on Kashmir is largely simplified, reducing the conflict to a communal Hindu-Muslim rivalry. Since the news on human rights (HR) violations come mainly from the Indian part of Kashmir, it

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is assumed that the problem is merely there and the people in Pakistani-administered Jammu and Kashmir (PaJK) are in a better situation than their neighbours in India. It is a significant strategic and diplomatic success of the Pakistani military and civilian bureaucracy, which have managed to direct attention to HR violations to the Indian side. Yet, the patterns of violence and restrictions on both sides of the border have followed similar trajectories. The Indian side gets much more media coverage due to better access to information from the region and fewer restrictions imposed by the Indian establishment on the local activities of NGO's (although their work is under permanent surveillance and they are regularly prevented from participating in international fora discussing HR violations and subjected to other forms of state-controlled restrictions, especially after bifurcation of the former Jammu and Kashmir state, J&K). Pakistani-administered Kashmiris are more restricted and banned from political activism, but still, they manage to smuggle out information about the situation in the almost inaccessible AJK and share it publicly. For example, Tanveer Ahmed is a founder of the AJK Public Agency, local independent journalist, researcher, activist, who investigates the fate of people abducted by the military establishment and undertakes initiatives aimed at improving the HR situation in AJK.[3] He supports the idea of independent, united Kashmir, where the solution can only be executed by the citizens of the territory without external interference.[4] He himself experienced the oppression at the hands of the establishment, being intimidated and arrested for his activities. After being accused of removing Pakistani flag in AJK's town of Dadyaal[5] in August 2020, Ahmed was detained, beaten by the security forces and then kept extra-judicially under arrest.[6]

The unquestionable right of the inhabitants to participate in the discourse related to managing the situation in Kashmir and potential conflict resolution is extensively questioned by the Governments of both India and Pakistan. The narrative of the establishments' dominant role in the conflict resolution and their respective iron-hand stance on Kashmir's future[7] overshadows the interests and wishes of the residents of all parts of the erstwhile PSJ&K. Particularly in Kashmir Valley, they are unceasingly subjected to multi-layered, state-structured HR violations. The sense of injustice led to trans-generational trauma,[8] which is deeply embedded in Kashmiris' collective narrative of victimhood and subjugation.

16.1 Regional security-related factors

The complex regional security dynamics with international interactions, alliances and enmities has always had a significant contribution to the Indo-Pakistani rivalry. During the Cold War, bilateral antagonisms between the two South Asian neighbours were incorporated into a grand political landscape with security interests of the powerful players, the United States and the USSR.[9] The new millennium is marked by India's economic and political rise,

acknowledged by international community, and New Delhi's ambitions to enhance its leadership role in the region and counterbalance China's hegemonic strategies. China's expansionism with its highly unpredictable outcomes has become a key pillar of global security debate with pivotal role of the Indian and Pacific Oceans. Consequently, the United States has upgraded its strategy vis-à-vis Indo-Pacific with the aim to bolster cooperation with Asian democracies and projecting its role as the leader of a struggle against authoritarianism (with particular reference to China and Russia). Within South Asia, this is tantamount to a greater 'pivot to India' in the upcoming years and potential dilapidation of Washington's already flawed relations with Pakistan. The future US-Pakistan relations will largely depend on the dynamics in Afghanistan and the rising threat of Islamic radicalism.

The intensified global competition between the United States and China with its looming trajectories is likely to have a notable contribution to shaping not only global but also regional strategic dynamics in South Asia with potential impact on the Indo-Pakistani relations and, by extension, Kashmir conflict. The geostrategic hard power positions of both South Asian neighbours has notably risen over the last three decades, due to nuclearisation of bilateral relations and their enhanced security cooperation with international players. The United States, growingly disenchanted with the alliance with Pakistan, which did not curb the *jihādists* activities, especially on the eve of American planned withdrawal from Afghanistan in 2021, is likely to bolster its multi-dimensional strategic cooperation with India. Washington is likely to shift its attention to deter Chinese strategic encroachment in Asian security landscape. India's regional and global aspirations are particularly noteworthy, heralding some interesting trajectories of New Delhi's interactions with Beijing, which will oscillate between trade cooperation and bolstered staunch rivalry over what both states regard as their sovereign rights. It may be assumed that Chinese incursions into IaJK were partly influenced by India's decisions regarding the Article 370. New Delhi's assertive policy vis-à-vis Ladakh and establishment of the UTL were regarded by Beijing as a challenge to China's sovereignty. The Sino-Indian animosities along the restive Himalayan border were manifested by the Line of Actual Control in Ladakh cross-border standoff in 2020, with both neighbours claiming to defend their territorial integrity. The escalation-prone relations with China and mutual muscle-flexing is likely to characterise the relations between the two Asian giants, yet at the same time their bilateral trade exchange is gradually enhanced and, according to some expectations, may reach even 100 billion dollars in 2021.

While exercising control over parts of the former PSJ&K's territories (Aksai Chin and Shaksgam Valley), China is not interested in settling the Indo-Pakistani conflict, which would include territorial decisions (possible concessions) regarding these regions. Beijing's power capabilities and its multi-level cooperation with Pakistan might strengthen China's ability to shape the strategic landscape in Kashmir. Being an 'all weather friend' of Pakistan, China, perceiving the South Asian neighbour as its most reliable

ally, has repeatedly leaned towards Islamabad/Rawalpindi regarding the Kashmir dispute, yet the official stance favours bilateral Islamabad-New Delhi talks, which is supportive rather of India's approach.

Paradoxically, in IaJK, Chinese flags have appeared along with the slogan 'Kashmiris are waiting for your help China'[10] in protest rallies held against what Kashmiri Muslims see as India's iron-fisted policy. Kashmiri support for Chinese engagement is surprising and may stem from the populist projection of the 'China-Pakistan friendship higher than Himalayas, deeper than oceans'. In fact, Chinese potential political or diplomatic intervention would likely prove counterproductive to the Kashmiri cause. With its dismal approach to HR and freedoms, authoritarian China has no credentials to mediate in the conflict or serve as a role model regarding democratic values and people-oriented reconciliation. Kashmiri quest for basic rights will never garner Beijing's support, because it is not within the interest of the Chinese leadership. China, which controls and occupies Uyghur Muslims in Xinjiang and Tibetan Buddhists in Tibet, also staunchly opposes separatist inclinations, let alone formation of any new state in the region.[11] The way that Chinese authorities treat dissidents and the brutal rights abuses by Chinese forces in these regions are particularly alarming. Beijing needs a settled security situation in Pakistan and de-escalation in neighbouring Afghanistan where China has already emerged as one of the major aid suppliers. The situation in war-torn Afghanistan remains unstable and the country retained its status of an authoritarian regime, at the time of writing, the only one in South Asia. The presidential elections held in September 2019, with re-election of Ashraf Ghani, were again, similarly to the 2014 elections, accompanied by ongoing political turmoil, fraud accusations from the opposition personified by Ghani's opponent, Abdullah Abdullah. Neither this protracted turmoil nor peace deal signed by the Trump administration and the Taliban on 29 February 2020 give any hope for improving the situation in Afghanistan, ending the Islamic fundamentalists' terror acts, Pakistan's army 'strategic depth' policy in Afghanistan with patronage of *jihādi* militancy. Political stabilisation and equality-oriented policies seem a distant future for Kabul. Joe Biden's administration, in a noteworthy manifestation of continuation of Trump's policy, declared withdrawal of troops from Afghanistan. Kabul, threatened with potential descent into chaos with Islamic fundamentalists acting once again with Pakistan 'Deep State's' support, is likely to remain a source of regional rivalry, which will engage *inter alia* Pakistan and India. Reduced American footprint may enhance China's role in strategic manoeuvring in Afghanistan, with the potential ability to impact Pakistan; Beijing, in its quest to eliminate destructive *jihādism* in the region, where it threatens Chinese interests and infrastructure, may recalibrate the way Pakistani establishment reintroduces the strategic depth-related objectives vis-à-vis Afghanistan, which are likely to be focused primarily on containing India's stabilisation-oriented efforts and its future interactions with Kabul.

The gradual political transition in India towards a more hawkish Hindutva-based nationalism is another factor which enhanced discord with Pakistan. In Narendra Modi's administration, Ajit Kumar Doval became National Security Advisor. Doval, India's most powerful security bureaucrat,[12] has also served as director of Intelligence Bureau (IB, one of India's primary intelligence agencies, the other being Research and Analysis Wing, RAW). Dubbed as India's James Bond, he oversaw covert counter-insurgency operations in Kashmir by convincing the militants such as Kuka Parray (on Ikhwanis see: Balcerowicz–Kuszewska 2022b) to surrender and change sides. Doval is a mastermind of a doctrine shift towards Pakistan, from defensive towards offensive defence and double squeeze doctrine as a strategic response against Pakistan's use of terrorist groups against India. It includes the punitive actions on Pakistani territory and was manifested by the 2016 surgical strikes in PaJK, in retaliation for the 18 September 2016 extremist group Jaish-e-Mohammed's attack on an army base near Uri, 10 km from the LoC, that killed 19 Indian soldiers. In February 2019, following the terrorist attack in Pulwama, India conducted Balakot (Pakistan's Khyber Pakhtunkhwa) airstrikes, which was elucidated as preemptive strike directed against a terrorist training camp. The tit-for-tat airstrikes (the next day Pakistan retaliated, downing India's aircraft) with warplanes crossing the LoC were the first since the 1971 Indo-Pakistani war.

In November 2019, following the Supreme Court's decision on building a Hindu temple on the disputed holy site of Ayodhya, Gideon Rachman, the chief *Financial Times* foreign affairs columnist, warned of the potential dire consequences of labelling India as the largest democracy while the country is sliding into Hindu-based authoritarianism.[13] He wrote: 'The world's democracies are desperate to believe in India (…) The West's fear of China means that it is likely to continue to give Modi's India a free pass for some time. But a failure to talk openly about the failings of the Modi model is not cost-free. The danger is that the west is embracing a comforting illusion—that democratic India will act as an ideological bulwark against authoritarian China. The reality is that India's slide into illiberalism may be strengthening the global trend towards authoritarianism'.[14] This persistent perception of India as a democracy, exacerbated by the West's apprehensive approach towards China's rise, might have a direct impact on the conformable acceptance of Indian policy in Kashmir. Pakistan's international image has been tarnished by its continuous support for Islamic radical groups. Consequently, Pakistan is perceived by the West as an unreliable actor and a safe haven for the extremists. This image was solidified when Osama bin Laden was killed by the US Navy SEALs in a targeted operation in May 2011, and it turned out he had lived with his family near Islamabad, with the likely support of Pakistani military establishment.[15] Pakistan's image may be further tarnished by its growing radicalisation resulting from the decision-makers' soft approach towards the radical, far-right Islamic organisations, such as Tehreek-e-Labbaik Pakistan. Furthermore, its future is likely to be

marked by growing financial crisis and international obligations (as of 2020 Pakistan's external debt oscillated around 110 billion dollars).

Particularly interesting and worth brief mentioning is the potential role of the major Arab states from the Persian Gulf (the United States and Arab states, in order to avoid referring to Iran, project its name as 'The Gulf') in the Indo-Pakistani dynamics. Contrary to Pakistan's traditional expectation of Muslim solidarity in criticism regarding India's policy in IaJK, on 6 August 2019, the United Arab Emirates supported New Delhi's decision of scrapping Article 370, regarding it as India's internal matter. Ahmad Al Banna, the UAE's Ambassador to India declared: 'We expect that the changes would improve social justice and security and confidence of the people in the local governance and will encourage further stability and peace'.[16] Following Narendra Modi's visit to Abu Dhabi in August 2015, the beginning of a comprehensive strategic partnership with an emphasis on the economic cooperation, defence, security, law enforcement related problems, culture, consular services and people-to-people contacts was declared.[17] Modi managed to successfully expand the relations with the Persian Gulf states, regarded as major trade partners and source of foreign direct investments. The Gulf-India cooperation directly impacts their reluctance to support Pakistani revisionism in the Kashmir Valley. Pakistan needs financial support from the Arab Gulf states (in January 2021, Saudi Arabia and the UAE extended the repayment of $2 billion loan, which was regarded as a thaw in strained relations).[18] The earlier 2018–2019 cooperation was supplemented by the Saudi aid package and investment pledge, but lack of Saudi support to Pakistan's Kashmir campaign after India annulled Article 370 contributed to deterioration between Riyadh-Islamabad/Rawalpindi. Yet, Saudi Arabia and the UAE, the key pillars of the GCC, (Gulf Cooperation Council) may regard Islamabad as valuable intermediary in expanding relations with China. Moreover, Riyadh and Abu Dhabi are interested in developing cooperation with both India and Pakistan, and in peaceful relations in the Indian subcontinent, and, therefore, they may have their contribution as brokers in Islamabad-New Delhi reconciliation processes.

16.2 Economic and trade-related factors

Political and strategic confrontation determines and adversely affects the Indo-Pakistani trade relations; both states are more inclined towards using the trade restrictions in a tit-for-tat political rivalry, than towards reviving a meaningful, development-oriented dialogue. Due to the conflict, India and Pakistan, the two largest economies in South Asia, barely trade with each other, which is detrimental to the regional development and multidimensional connectivity. Consequently, South Asia remains the least internally integrated region in the world in terms of economic and political collaboration. Trade within South Asian bloc increases at a slower rate than South Asia's total trade, even though there is no doubt that enhanced economic ties would bring multiple benefits to all states.[19]

The necessity to boost trade relations was numerously recognised in bilateral talks and certain initiatives aimed at normalising restrictive bilateral trade regime were introduced. The formulation and then coming into force of the SAFTA (South Asian Free Trade Agreement) in 2006 was a step in good direction, which improved the trade exchange significantly.[20] Another important breakthrough came in April 2011 when the bilateral trade-related talks were resumed. Pakistan pledged to grant a Most Favoured Nation (MFN) status to India and India reduced its sensitive list (list of products which do not include tariff concessions) under the SAFTA by 30%.[21] Notably, India granted the MFN status to Pakistan in 1996; until that year, both countries traded a limited number of items, which was referred to as positive list. The measures to simplify customs procedures and trade by opening national banking operations had a positive impact on further normalisation.[22] Whereas in the year 1998–1999 the total trade between Indian and Pakistan was 233.8 million dollars, by mid-2000s, it increased to 610 million dollars and in 2012–2013 it reached 2.3 billion dollars. Since then, it has not improved much: in 2018–2019, it did not exceed 2.6 billion dollars (Table 16.1), which illustrates the overall very limited progress of trade liberalisation while political relations remain incessantly tense. Such limited exchange is just a drop in the ocean: the potential and needs for boosting the trade are much higher. According to the World Bank, bilateral trade has enormous potential; it could be 15-fold more than current levels and reach the figure of 37 billion dollars, if the existing barriers were removed.[23]

The 14 February 2019 terrorist attack against CPRF in IaJK's Pulwama district had a devastating impact on bilateral trade relations. In a bid to hit Pakistan's Indian exports, New Delhi revoked Pakistan's MFN status and drastically raised customs duties on all the goods imported from Pakistan (for example, cement, fresh fruit, petroleum products and mineral ore) to 200%. Before that decision was taken, the tariffs for the two main items imported from Pakistan—fruits and cement—were 30–50% and 7.5%, respectively. Moreover, flights were suspended as Pakistan reciprocated

Table 16.1 India-Pakistan export/import (in US$ million) and share in India's global trade

Year	*Export*	*%Share*	*Import*	*%Share*	*Total India-Pakistan trade*	*%Share*	*%Growth (total trade)*
2014–2015	1,857.18	0.60	497.31	0.11	2,354.49	0.31	No data
2015–2016	2,171.17	0.83	441.03	0.12	2,612.20	0.41	10.95
2016–2017	1,821.87	0.66	454.49	0.12	2,276.36	0.34	–12.86
2017–2018	1,924.28	0.63	488.56	0.10	2,412.83	0.31	6.00
2018–2019	2,066.56	0.63	494.87	0.10	2,561.44	0.30	6.16

Source: Data compiled by the author from Government of India, Ministry of Commerce and Industry (GI-MCI).

the restrictions and closed its air space to India. As always, the major burden of the ongoing conflict was paid by the common people, especially those living in conflict are faced with unpredictable economic future. The multi-dimensional Kashmir-oriented CBMs should include the discussion on the people-oriented mechanisms and safety measures which, in the case of sudden escalation, do not involve such mobility- and trade-related punitive actions. Additionally, the lockdowns and restrictions imposed because of the Covid-19 pandemic, practically froze the movement of people and trade. With the start of the pandemic, both countries closed their borders on 16 March 2020. Throughout the year 2020, bilateral exchange came to a standstill, with the Wagah border trade, train and bus services suspended.

India and Pakistan account for more than 90% of the region's gross domestic product (GDP), 80% of South Asia's surface area and 85% of its population, yet, due to protracted hostility, bilateral trade exchange is approximately 20% of trade within the region.[24] Restricted connectivity combined with economic and political hurdles adversely affects more than 1.8 billion people living in South Asia. The grim situation is illustrated by a very low level of intra-regional trade within South Asia, which in the first decade of the 21st century did not exceed 6% of the total share of region's global trade.[25] According to the data published by the Ministry of Commerce and Industry, Department of Commerce, South Asia comprises a paltry of 7.7% of India's total trade.[26] The dynamics of Indo-Pakistani relationship will continue to have a decisive impact on the prospects for development in the entire region, being either a driving force for enhancing cooperation or a hindering factor. The recent data presented in Table 16.1 show how insignificant the share of Pakistani import/export is in India's overall trade.

The upsetting data regarding Indo-Pakistani trade exchange, displayed in the Tables 16.2 and 16.3, is a consequence of various factors, including a decade-long process of negligence, mistrust, Pakistan's apprehensions regarding India's multi-dimensional domination and lack of will to improve economic cooperation between the two states. Geopolitics and constant tensions have badly affected the economic interactions between India and Pakistan; business communities seem to be overwhelmed by politics and

Table 16.2 **Export**. Top three commodities exported from India to Pakistan (2017–2018, 2018–2019) and their values (in US$ million)

Export to Pakistan	*Commodity and value in US$ million*
Total export in 2017–2018: 1,924.28	1. Cotton 544.40
	2. Organic chemicals 314.91
	3. Plastic and articles thereof 113.31
Total export in 2018–2019: 2,066.56	1. Cotton 550.33
	2. Organic chemicals 457.75
	3. Plastic and articles thereof 131.19

Source: Data compiled by the author from Government of India, Ministry of Commerce and Industry (GI-MCI).

Table 16.3 **Import**. Top three commodities imported from Pakistan to India (2017–2018, 2018–2019) and their values (in US $million)

Import to India	*Commodity and value in US$ million*
Total import in 2017–2018: 488.56	1. Edible fruit and nuts, peel or citrus fruit, melons 112.82 2. Salt, sulphur, earths and stone, plastering materials, lime, cement 105.18 3. Mineral fuels, mineral oils 83.01
Total import in 2018–2019: 494.87	1. Mineral fuels, mineral oils and products of their distillation 131.29 2. Edible fruit and nuts, peel or citrus fruit, melons 103.27 3. Salt, sulphur, earths and stone, plastering materials, lime, cement 92.84

Source: Data compiled by the author from Government of India, Ministry of Commerce and Industry (GI-MCI).

do not dare to push for greater bilateral trade exchange, which resonates negatively in the entire region. The inter-SAARC (South Asian Association for Regional Cooperation) trade flow constitutes a very small portion of the total trade of the member countries.[27]

Even before the pandemic, according to a report published by the United Nations Conference on Trade and Development (UNCTAD), the prognoses for the economic growth of India and Pakistan were grim. The document pointed out that 'growth projections for India have been marked down, because of a sharp fall to 5.8 per cent in the first quarter of 2019 (relative to the corresponding quarter of the previous year). This continues a decelerating trend which began four years ago'.[28] The report also highlighted that 'Pakistan is in the midst of a crisis: the growth rate has almost halved, the balance of payments is in poor shape, the rupee has depreciated significantly, and external debt is large and rising. While support from China and Saudi Arabia and a large IMF loan have helped address the immediate problem, the crisis has not been resolved'.[29] It has to be assumed that the COVID-19 pandemic with its unpredictable consequences is likely to have detrimental impact on bilateral economic relations, additionally affecting the fragile economies of South Asian states. This should also serve as a motivation for enhanced regional cooperation and trade facilitation initiatives when the pandemic ends. Enhanced trade between the two neighbours would bring positive spill over effects for the entire region; expanding interregional South Asian cooperation and strengthening the SAARC's position in global economy seems a crucial factor which could accelerate regional development.

The prevalent lack of trust in mutual Indo-Pakistani relations translates into a lack of willingness to engage in meaningful bilateral initiatives; the detrimental impact of this reluctance goes well beyond the Kashmir conflict. Taking into consideration the serious challenges which South Asia will have to tackle soon, particularly the impacts of climate change, including exacerbating water insecurity, climate-induced natural disasters and rising

sea levels,[30] post-COVID-19 economic recovery, lack of cooperation and the failed attempts at conflict resolution make both states increasingly vulnerable to these imminent problems.

The low level of intra-regional integration provides geo-economic space for the external players and prompts South Asian countries to enhance economic cooperation and strategic alliances with them. China is making successful geostrategic and economic inroads into the region, offering investments and upgrading strategic and trade-related ties with Pakistan, Bangladesh, Nepal, Sri Lanka and the Maldives.[31] India reacts apprehensively, assuming this as an element of Beijing's 'string of pearls' policy aimed at the strategic encirclement of India and the strengthening of China's presence in the Indian Ocean. The Indo-Pakistani protracted animosities created opportunities on South Asia's flanks which can be used by external players to destabilise the subcontinent and undermine the reconciliation process in the future. This situation will further endure as, in both New Delhi and Islamabad, there is neither the willingness nor the ability to compromise over contentious issues to strengthen subcontinental economic ties. Pakistani establishment looks at enhancing cooperation with apprehension, assuming that any alliance with the Indians would call into question the two-nation theory and would thus mean that there was no need for partition and the inception of a separate state for Muslims. This ideologically motivated approach is a significant impediment for developing the economic relations. Conspicuously, the failure to go beyond ideological objectives has multi-faceted consequences: political, diplomatic, economic, social and cultural. The crippled SAARC (set up in 1985) is referred to as 'ritualistic' (summit rituals with heads of the states, working groups, mechanisms, etc.) and 'magnificent paper tiger' as practically it neither fulfils its functions nor realises its potential.[32] Unfortunately, the SAARC incessantly reflects the geopolitical challenges of the region with prevalent lack of trust between India and Pakistan and is largely dependent on the current state of their bilateral relations. Ongoing crises successfully impediments its functioning. For example, the 19th SAARC summit scheduled for November 2016 in Islamabad was cancelled, because of the crisis after the Uri attack against Indian security forces in J&K, for which India accused Pakistan. All other member states (apart from Nepal which was the chair of the organisation since November 2014) followed India's decision to boycott the event and declared that they would not send their representatives.

There is an urgent need to expand the scarce trade exchange between India and Pakistan also because limited economic relations badly affect the development prospects in divided Kashmir. The trade depends heavily on the state of affairs between the two rivals at the given moment and has been regularly halted (for example, due to heavy cross-LoC shelling, which causes many casualties) and revived. In 2005, the LoC was officially opened for the movement of people, followed by the cross-LoC trade for the first time since its closure in the aftermath of the Indo-Pakistani war

of 1947–1948,[33] and which was termed as 'the 61-year-long cherished dream of many Kashmiris'.[34] In July 2017, the Chakothi-Uri crossing point suffered a blow after India alleged that a truck from AJK had smuggled 'a huge quantity of heroin'.[35] In times of escalation, people visiting families are stranded on both sides, sometimes for many weeks. In October 2017, following a break of a few months in travel and trade due to heavy shelling, the HR activists supported by intra-Kashmir traders, organised a rally and forced the authorities to establish a hotline contact between AJK and J&K. People visiting their relatives claim to be subjected to many restrictions, for example, those coming to AJK must bring Pakistani currency instead of the US dollars, because no bank on their side of Poonch is authorised to change foreign currency.[36] In a post-pandemic future, is crucial to resume and upgrade the person-to-person contacts, including those between the trading community and divided families. To soften the border, Kashmir-oriented confidence building measures (KOCBMs, *vide infra*, §17) should be introduced, originating in Kashmir and managed by the people across the LoC. Those KOCBMs should be contextualised within the socio-political situation and the sentiments of the residents of the disputed areas, with the goal focused on the enhanced cross-border connectivity. As far as trade is concerned, the typical mercantile goods, which are traded from IaJK to AJK, include: carpets, rugs, wall hangings, shawls, *namdas* (handmade local, colourfully embroidered carpets/rugs), *gabbas* (traditional Kashmiri handicraft from the Valley[37]), furniture, fresh fruits and vegetables, dry fruits, including walnuts, saffron, aromatic plants, Kashmiri spices, honey and papier-mâché products.[38]

India and Pakistan are linked by a shared historical heritage and common cultural bonds. These unparalleled affinities should not be denied or distorted but rather provide a useful diplomatic framework for the reconciliation process. Unfortunately, already in pre-Corona times, bilateral exchanges have been sharply decreasing due to the strained relations between the two countries. Apart from trade-related impediments, the access to culture has been regularly denied by banning Bollywood movies in Pakistan, cancelling musical or other artistic events in India or Pakistan and denying visas to scholars, activists and artists from the neighbouring country. Promoting the culture of tolerance through interactions and building bridges via artistic collaboration could serve as a vital mechanism for developing mutual trust. De-radicalisation of the education systems in India and Pakistan is urgently needed to address the collective traumatic memories and deal with politically motivated communalism in a constructive manner. Programmes aimed at changing attitudes through school curricula are expected to have a significant impact over a long period of time.[39] The introduction of modern curricula will require courageous, determined leadership as it is likely to face firm opposition from the radical, nationalist elements on both sides.

Empowering the indigenous inhabitants of divided Kashmir by resuming and augmenting cross-border trade linkages and people-to-people contacts

between the divided parts of Kashmir is a *sine qua non* condition for development. Sumantra Bose (2003: 263) argued at the turn of the century that 'a longer-term Kashmir settlement necessitates that the LoC be transformed–from an iron curtain of barbed wire, bunkers, trenches, and hostile militaries to a linen curtain between self-governing Indian and Pakistani regions of Jammu and Kashmir'. That would most likely involve gradual demilitarisation, which would require both countries to be mature enough to introduce a major shift in their respective strategic approaches in the region. The decentralisation of political and economic power, achievable through the autonomy of the regions of the erstwhile PSJ&K, is contrary to the policies vis-à-vis Kashmir which are being implemented by India and Pakistan. Meanwhile, the two objectives of ensuring self-governance and focusing on multi-dimensional human development should be regarded as central to the concept of autonomy. Implementation of the cross-border CBMs should be considered as a pillar of such policy, for example, by establishing joint institutions between J&K (presently the union territory) and AJK.[40] The restoration of the cross-LoC trade, interrupted due to February 2019 Pulwama terror attack, bifurcation of Kashmir by the Indian government and the results of the COVID-19 pandemic, remained key problems in early 2021. Enabling the economic and cultural cross-LoC cooperation between Ladakh and Gilgit-Baltistan is another challenging step to initiate the regional normalisation.

Taking into consideration the above-mentioned aspects of limited economic cooperation and its dismal impact on IaJK and PaJK, the trade relations between India and Pakistan should be prioritised and reconceptualised under the policy of a 're-connectivity roadmap', consisting of various initiatives and projects, that would soften the artificial, politically crafted borders and enable people to reclaim their agency, reestablish cross-border trade and cultural connectivity. This could lead to establishing a framework for regional cooperation in the future—an economic trade corridor, managed collectively by the SAARC, which would include multiple initiatives, projects, infrastructure and energy resources transportation (for example, the project TAPI[41]). The potential dividends of such endeavours are unquestionable: not only would they strengthen the intra- and inter-regional cooperation and development but also they would bolster South Asia's position against external geostrategic encroachments. Such a multi-oriented local and regional re-connectivity roadmap could be implemented as a key pillar of a composite Indo-Pakistani dialogue by the future, more progressive leaderships.

Notes

1. Kasuri (2016: 318).
2. Braithwaite–D'Costa (2018: 9).
3. Tanveer Ahmed (2019-04-26).
4. Tanveer Ahmed (*blog,* 2018-07-12).

5. It happened on Muhammad Maqbool Bhat square, commemorating Kashmiri pro-independence leader, hanged in India in 1984 by the then Indira Gandhi government. For many Kashmiris on both sides, he remains a symbol of national unity executed for political reasons; hoisting Pakistani flag in such place evoked uproar among many AJK locals.
6. More: Kermani (2020).
7. See: Pathania–Saksena (2012: 18).
8. Hingorani (2016: xxi).
9. More historical analysis: Ganguly (2016), Jacob (2013), Balcerowicz–Kuszewska (2022a).
10. During the October 2016 anti-Indian protests held in the northern Kashmiri town of Baramulla, the Pakistani and Chinese flags were held together, with an inscription 'Kashmiris are waiting for your help *Chaina*' (italics—A.K.); there was an error in the name of China on the flag held by the protesters. (KO 2016-10-19).
11. Misgar (2017). The author quotes Professor Dibyesh Anand from the University of Westminster.
12. Donthi (2017).
13. More analysis and international reports on India (and Pakistan), see Balcerowicz–Kuszewska (2022b).
14. Rachman (2019).
15. Feinstein (2011: 430–431).
16. GN (2019-06-08).
17. MEA (2015).
18. In 2015, Pakistan's parliament, willing to keep the balance in relations with Saudi Arabia and Iran, rightfully declared neutrality and refused to provide military support to the Saudi-led operation in Yemen against Shī'a-Houthi rebels. In 2018, Pakistani army (the COAS, General Qamar Javed Bajwa) declared that the troops will be sent to Saudi Arabia (but not to Yemen) which ignited a domestic political crisis, with the opposition accusing the government of neglecting the parliament-sanctioned decision and submitting to the military domination in shaping relations with strategically vital partners (Panda 2018).
19. Chand–Saxena (2017: 16).
20. Pakistan's export to India increased from 323 million dollars to 542 million during 2006–2007 to 2012–2013 (an increase of 67.8% over six years). India's exports to Pakistan in the same period increased by 56.4%, from 1.350 billion dollars to 2 billion dollars (Chand–Saxena 2017: 19).
21. In 2018, Pakistan's revised sensitive list under SAFTA included 936 items (GPMC 2018).
22. Majid (2015: 273).
23. Kathuria–Mathur (2018: 37).
24. Raihan–De (2014: 443).
25. Mahmud–Chowdhury (2008: 20). Haqqani (2018: 309) points out that dismally low intra-regional trade comprises only 5% of total trade of eight South Asian countries. He compares it to 25% trade within the Association of South-East Asian Nations (ASEAN) region and half of the trade within the North American Free Trade Agreement (NAFTA).
26. GI-MCI.
27. Aiyer (2017: 19).
28. UNCTAD (2019: 3).
29. UNCTAD (2019: 23).
30. WB (2019).
31. Brewster (2014: 186).

32. Lama (2010: 403).
33. Chandran (2008: 12).
34. Local cross-LoC truck driver quoted by Mahapatra (2018: 76).
35. Naquash (2017a).
36. Naquash (2017b).
37. Mahjabeen Akhter (2017: 323–324) observes: 'Kashmir is the homeland of various decorative renowned arts and crafts which have been for centuries renowned for their and beauty. (…) The Gabbas and Namdas are mostly used as floor-rugs and coverings, being cheaper substitute for carpets and rugs'.
38. Source: Trade and Travel Authority (TATA). Data obtained from Syed Waqas Ali Kausar, Head Dept. of Governance & Public Policy at NUML, Islamabad.
39. Ross–Rothman (1999: 16)
40. Kumar–Puri (2009: 259).
41. The Turkmenistan-Afghanistan-Pakistan-India pipeline mega-project would not only bring much needed energy to South Asia but also boost the Central Asia-South Asia connectivity. By diversifying Turkmenistan's natural gas export, it would also reduce Ashgabat's economic dependence on China. Unfortunately, the infrastructure is burdened with a high risk of trespassing extremely volatile regions, and, again, its implementation would require a shift in Indo-Pakistani relations. As in the case of other such projects, taking into consideration the interests and concerns of local communities living along the project's route is another *sine qua non* condition for its successful implementation and its role as an inclusive tool for inter- and intraregional connectivity. Unfortunately, as of early 2021, work on the project was stalled.

17 Yearning for a resolution: 'new India' and 'new Pakistan'?

Agnieszka Kuszewska

Removing hindrances to normalisation of Indo-Pakistani relations and initiating collaborative schemes is likely to remain a challenging task for the current and future leaderships of both countries. They are prone to confrontation rather than reconciliation and relentlessly reinforce their self-projected, seemingly mutually exclusive, yet largely parallel, narratives on bilateral relations and policies vis-à-vis Kashmir (the chunks they administer and those held by the rival state). Persistently continued structural socio-political dispossession, human rights (HR) violations and demographic engineering in respective chunks of the former Princely State of Jammu and Kashmir (PSJ&K) (including settlements to install outsiders in prominent positions) gradually disenfranchises indigenous inhabitants, especially those who reject hegemonic policies[1] and illustrates the way a disputed region is viewed by both states.

More than seven decades after liberation from colonial oppression, India and Pakistan, presently assessed as a flawed democracy and a hybrid regime, respectively, face two major challenges which entail the urgent need to reframe their discourses and to emerge as mature, modern democracies, capable to build peaceful relations.

First, it needs to be acknowledged that despite the fact that Indo-Pakistani conflict has its roots in the turbulent colonial era of divide and rule policies, which intensified communal animosities and led to the Indian subcontinent partition, its dynamics and management should not be determined by historically inherited distrust, traumas, replication of hostile interactions and post-colonial perception of people living in strategically 'fragile' regions. The dividends which would emanate from dialogue and reconciliation advocated bilaterally and domestically cannot be overestimated.

Second, India and Pakistan need to reconceptualise their domestic and bilateral policies, adjust them to the challenges of the 21st century and develop the abilities to jointly tackle a plethora of problems with which they are already dealing with and which are soon likely to affect them more substantially, such as climate change, water management, energy crisis, poverty and religiously motivated radicalisation. For that purpose, both countries need to provide a genuine framework to reconciliate bilaterally,

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renounce hostility incited by far-right populists, hegemonic governing vis-à-vis Kashmir and recognise the necessity to provide socio-political rights to its inhabitants. The leaderships face the challenge to reframe the mutual discourse, which will require a major shift in their strategic culture and security objectives. It could be done by promoting unbiased historical debates and introducing them into respective educational systems and by decolonising the state-led rhetoric vis-à-vis each other and vis-à-vis Kashmir, with prioritising multi-track dialogue and HR protection.

Addressing such challenges is not only limited to India and Pakistan but is also a part of a global struggle to deal with autocratic leaderships that persistently quash dissent, disrespect democratic values, engage in confrontative tussles and introduce populist, belligerent nationalisms as a means of upholding their political power and privileges. In 1984, Barbara Tuchman, in her *March of the Folly*, examined the governments' launching policies which are in fact contrary to their own interests and to the welfare of the whole nations, despite the availability of achievable alternatives. She highlighted the paradoxes of such folly, counterproductive policies throughout the history. They were introduced even though the authorities were aware of the potential for disaster; Tuchman concluded that the greater inducement to folly is excess of power, which leads to disorder and injustice vis-à-vis the governed.[2] The case of India and Pakistan shows similar trajectories of folly-based policies with their inflexible, ideologically motivated discourses, where the leaders either do not (want to) draw conclusions from history or/and narcissistically believe in their absolute moral superiority in shaping political discourses. In such circumstances, *exitus ācta probat,* the outcome justifies the deed. Accordingly, there is an excuse for HR violations, draconian laws, forced indoctrination, gross misuse of power accompanied by lack of accountability and unjust allocation of public resources. Much political effort is being done to materialise unattainable strategic objectives (Pakistan's territorial revisionism in Kashmir) or to trigger communal violence (BJP/RSS-propagated Hindutva) than on materialising pragmatic, mutually beneficial goals, such as enhanced regional integration, bilateral trade and common development projects. In both cases, ideologically motivated, belligerent manoeuvrings, bolstering self-projected grandiosity, inciting mutual distrust and enmity, despite the fact that alternative options are available, act against the interests of Indian and Pakistani societies as a whole. Many projects detrimental to regional development and prosperity of the people cannot be implemented due to persistent rivalry and incessantly projected hostility. Despite geographical accessibility, which should be one of the natural driving forces for such initiatives, different economic corridors and other connectivity projects, which could traverse both states and connect them with resource-rich regions, remain an unfulfilled promise. For example, the TAPI (a 1814 km Turkmenistan-Afghanistan-Pakistan-India Pipeline), which could rebuild historical affinities between South and Central Asia and bring benefits to all involved states by transporting natural gas from the Galkynysh Gas Field in

Turkmenistan to the Indian town of Fazilka (Punjab), has not been materialised. Indian and Pakistani cooperation initiatives with other regions or states are undertaken with omission of the neighbouring arch-rival.[3] The regional security dynamics (Afghanistan's instability) further delays such projects.

Hegemony seems a core principle of administration in all chunks of Kashmir, diffused by central authorities and agencies, which regard the administered regions mostly as ideologically and strategically valuable assets and accumulate excessive profits from exploiting their resources. The centralised control in IaJK and PaJK is not tantamount to providing people with fundamental rights enshrined in the states' respective constitutional systems and international HR regime, of which both India and Pakistan are part, but to defend and legalise the ruling civilian and military stakeholders' position in managing the resources and assuring that the state retains unabated, enduring access to them. Accordingly, hegemonic policies are perpetuated by introducing legislation (legalised illegalities),[4] which normalises the policy of disenfranchisement, safeguards the prevalence of impunity of the perpetrators and limits the fundamental rights and freedoms of Kashmiris. It further disenchants the indigenous inhabitants against federal stakeholders. An Indo-Pakistani rapprochement, crowned by settlement of the Kashmir conflict with protection of HR of all its residents, remains a *sine qua non* condition for regional development. A way to provide self-determination to the region would be to collaborate on awarding the status of a self-governing, autonomous province to all the territories of erstwhile PSJ&K and enable their inhabitants to freely cross the border.

The chances for that are currently sorely limited; Kashmir is likely to boil and the sabre-rattling along the border will relentlessly engage both states and destroy lives along the LoC. The conflict remains a costly tragedy of the common people in both South Asian countries, especially those already impoverished, marginalised and persecuted. Sadly, not much hope is left for the prospects of improving cooperation and enhancing integration within South Asia.

Many voters in India and Pakistan were disenchanted by the Congress and Pakistan Muslim League-Nawaz (PML-N) policies, respectively, in particular by corruption allegations and lack of providing solutions to key problems of the poorer segments of both societies: job security, employment, proper access to education, healthcare, etc. In such circumstances, the far-right populism, which rejects cultural diversity, promises resurgence of 'moral values', and at the same time blames the intentionally projected enemies (minorities, outsiders) for all shortcomings, has more chance to dominate the public discourse and accumulate support. Pakistani establishment helped to channel people's dissatisfaction into the promise of 'new Pakistan', symbolised by Imran Khan, 'the Captain' who pledged to provide a meaningful change. India's Hindutva proponents managed to bolster their political capital around the populist leader, Narendra Modi, and won the elections twice. Their few years in power prove that the pledges of 'new India' and 'new Pakistan' have not brought positive transformation

but rather bolstered India's democratic backsliding and Pakistan's inching towards Talibanisation, exacerbated cleavages within societies and escalated bellicose narratives. If continued unabated, this will hinder any progress in conflict resolution and limit the chances for regional development.

As mentioned above, the lack of Indo-Pakistani reconciliation should be contextualised within a larger global challenge of democratic decay, rising nationalism and HR losing their prominence as initiators of international pressure in the case of violations or autocratisation. Donald Trump's tenure, a tough lesson for the United States and beyond, illustrated that no country is safeguarded against the evisceration of democratic values, institutions and the rule of law. Democracy should be constantly watched over and protected; otherwise, it may always be prone to regression and endangered by belligerent, populist narratives, which polarise societies and drive a wedge between the states. Canadian Prime Minister Justin Trudeau, in his address to the UN General Assembly in September 2020, pertinently accentuated far-reaching inability of the international community to unite in defending democratic values and facing contemporary challenges: 'The international approach we relied on since the second half of the 20th century was built on an understanding that countries would work together. But now the same countries are looking inward and are divided. We need to recognise where we are. The system is broken, and the world is in crisis. And things are about to get much worse unless we change'.[5]

The Indo-Pakistani conflict is unlikely to be resolved bilaterally and taking into consideration the ongoing violations of HR and political freedoms by both states, the international community should be more engaged in the peace process. Consequently, a more robust international diplomatic intervention may be indispensable given the lack of progress in negotiations between India and Pakistan, with inclusion of representatives of the IaJK's and PaJK's indigenous inhabitants in the talks. To avoid further deterioration of bilateral relations, a mechanism based on reciprocal flexibility should be applied to the management of Indo-Pakistani interactions. Negotiating and signing a reframed and updated bilateral agreement on rules and fundamental principles on how to act in case of imminent escalation could serve as a formal catalyst to pursue policies bringing long-term benefits and to move forward in shaping a new framework for more conciliatory and inclusive political and socio-economic interactions.

A modern catalogue of fundamental HR enshrined by 1948 Universal Declaration of Human Rights, adopted by UN General Assembly, later supplemented with multiple legally binding covenants and conventions, aims to establish an international system safeguarding the protection of HR. India and Pakistan are part of global HR regime and certain legally binding documents were ratified by them; fundamental rights and freedoms are also guaranteed by their respective constitutions.

Table 17.1 situates India and Pakistan within the contemporary international HR regime, showing the state of ratification of selected vital instruments.

Table 17.1 India and Pakistan vis-à-vis selected international human rights instruments[a]

	HR instrument (date into force)						
State	*International Covenant on Civil and Political Rights 1976*	*1st Optional Protocol to the International Covenant on Civil and Political Rights 1976*	*International Covenant on Economic, Social and Cultural Rights 1976*	*Convention on the Elimination of all Forms of Discrimination Against Women 1981*	*Convention on the Rights of the Child 1990*	*Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2002*	*International Convention for the Protection of All Persons from Enforced Disappearance 2010*
India	R (1979)	NA	R (1979)	S (1980); R (1993)	R (1992)	S (2004); R (2005)	S (2007)
Pakistan	S (2008); R (2010)	NA	S (2004); R (2008)	R (1996)	S (1990); R (1990)	S (2001); R (2016)	NA

a R = ratified, S = signed, NA = no action.

Source: Data compiled from UNHR.

As all other states, which participate in the international HR system, India and Pakistan declare their obligation (and are obliged) to respect rights and freedoms of all their citizens. Consequently, potential Kashmir resolution roadmap should be anchored in a non-negotiable precondition: guaranteed protection of inalienable HR of all inhabitants of divided Kashmir. Meanwhile, fundamental rights and freedoms, such as freedom of conscience and religion, freedom of thought (including freedom of opinion, of the press and other media) and freedom of peaceful assembly and association, enshrined in international HR instruments, are systemically and systematically violated in both parts of Kashmir.[6]

In order to tackle all challenges, an updated multilaterally crafted mechanism of addressing economic, social and political aspects with regular consultations should be launched. Formulating and introducing a well-coordinated, unprejudiced and reconceptualised strategy, which could be termed as Kashmir-oriented confidence building measures (KOCBMs), could facilitate the multi-layered reconciliation and trust-building process, bolster the multidimensional veneration of HR by the major stakeholders, craft the blueprint for Kashmir's future and objectively address the problem of the abuses. Conspicuously, it is crucial to provide inclusiveness of such initiatives, with engaging civil society non-governmental representatives from both countries including Kashmir, for example, the activists engaged in Pakistan-India People's Forum for Peace & Democracy (*vide infra* §15.2).

While constructing conflict resolution frameworks with the potentially attainable goals, it should be remembered that the former PSJ&K was an artificially stitched political entity of multi-dimensionally diverse parts that never developed distinctive common identity, let alone, national awareness. Conversely, various power rivalries and discourses of deprivation have characterised the internal dynamics.[7] It is therefore obvious that transforming the whole region into a separate state is simply impossible not only due to staunch resilience from Islamabad/Rawalpindi and New Delhi. Therefore, the tailor-made resolution needs to address these narratives in IaJK and PaJK in a most appropriate way. The introduction of KOCBMs with multidimensionally defined HR-oriented approach would require a groundbreaking shift in the political rhetoric of both governments and, realistically thinking, this is rather a challenge which may be positively addressed by the future administrations, not the current ones, unless certain additional circumstances occur. The KOCBMs should be outlined around certain key principles. First, safeguarding the continuity of a diplomatic process based on goodwill and transparency , is of utmost importance. The multiple track peace process (including international fora, the SAARC, etc. bilateral top-leadership Track I, Track II with professionals, academics, former diplomats or military leaders and cross-LoC grassroot Track III) should be reintroduced. It will facilitate *détente* and eradicate *Feindbild*: projecting the hostile image of an enemy/neighbouring state/citizens, based on lack of trust, leading to negative (ethnic, religious) stereotypes, confrontational postures, hate speech, etc.[8]

Feindbild is ubiquitous not only in Indo-Pakistani relations; it is also present at local, cross-LoC level (*vide infra*). Second, establishing or strengthening the already existing institutions and mechanisms of peacebuilding, with the precondition that the independently elected representatives of the IaJK (both UTs) and PaJK will participate in the process. Third, addressing the problems, which must be debated on a regional level, such as trade exchange, socio-cultural interactions, growing scarcity of resources (water management, constructing dams on Indus River and its tributaries, which is a vital element of Indo-Pakistani tensions in Kashmir). Fourth, discussing the problem of radicalisation and terrorism and gradual demilitarisation of all parts of the former PSJ&K, wherever it is possible. Such holistically defined KOCBMs would provide a multilayered discursive platform to debate on peacebuilding initiatives and other multiple challenging issues, which need to be addressed to provide a solution to Kashmir conflict, reconciliation between India and Pakistan and, in a broader sense, to pave the way to the re-conceptualisation of South Asia as a distinctive region with political and socio-economic integrational objectives.

So far any Indo-Pakistani negotiations over the Kashmir conflict settlement have proved to be a dismal failure with no lasting outcomes, despite multiple initiatives, including dialogue conducted under Track I, II and III diplomacy and back-channel initiatives. However, India and Pakistan have no better option but to cooperate and integrate politically and economically if they are to achieve genuine progress, upgrade their role in dynamically changing world order and strengthen the international position of the entire region. United by history, unprecedented socio-cultural bonds and economically and geographically interdependent, they have shared challenges and a common interest in normalising bilateral relations.[9] This obvious reasoning is unfortunately persistently contravened by geostrategic realities and bellicose leaderships, which have turned South Asia into one of the most dangerous places on earth.[10]

Indian and Pakistani policies vis-à-vis Kashmir follow similar trajectories regarding their attitude towards the demand of *āzādī*, which has become an operative narrative among Kashmiri Muslims, particularly in the Valley. Neither India nor Pakistan are inclined to facilitate free cross-LoC trade and contacts for the divided families or provide political self-determination to the residents of Kashmir as it would tarnish both countries' identity-related hyper-nationalist postures and question their supremacist control over their respective chunks of Kashmir. Nonetheless, the Track III grassroots peacebuilding should play an enhanced role in reconciliation process and should be facilitated by ruling establishment as part of a composite dialogue. Enabled by 2003 ceasefire and Indo-Pakistani *détente* of the time, the cross-LoC travel commenced in 2005. Thereafter, the trade through the Uri-Muzaffarabad and the Poonch-Rawalakot crossings was launched on 21 October 2008. A survey conducted in 2016 by Pawan Bali and Shaheen Akhtar (2017: 4–10) among civil society members, media, academia, lawyers, traders and bus travellers in IaJK and PaJK demonstrated

Table 17.2 The impact of cross LoC interactions on people living across the border (in %)

	IaJK	*PaJK*	*Total*
People-to-people contacts and change in the Kashmir conflict	Yes 60.6 No 39.4	Yes 52 No 48	56 44
Cross-LoC interaction and perception shift	Yes 57.3 No 35.3 Limited 7.4	Yes 29.3 No 30 Limited 40.4	43.3 32.7 24
Cross-LoC interaction and economic change	Yes 32.6 No 30.7 Limited 36.7	Yes 19.3 No 20.7 Limited 60.0	26 25.6 48.4
Cross-LoC interaction and social change	Yes 33.3 No 50 Limited 16.7	Yes 20 No 39.9 Limited 40.7	26.7 44.7 28.7
Improved Indo-Pakistani relations	4.6	3.3	4
Changing perceptions and trust building	32.7	30	31

Source: Bali–Akhtar (2017: 4–8).

that peacebuilding across the LoC, although relevant to the people on both sides of the border, did not sufficiently improve people-to-people interactions, especially in social and economic terms.

As Table 17.2 shows, most respondents on both sides (more than 60% in IaJK, 52% in PaJK) declared that the people-to-people contacts brought some positive changes and had some impact on the Kashmir conflict, yet only 4% (4.6. in IaJK and 3.3 in PaJK) admitted that it had in some way helped to boost Indo-Pakistani relations. The economic change was felt only by 26% Kashmiris (32.6 in IaJK, 19.3 in PaJK). The impact of cross LoC interactions on social change was denied by approximately 45% of respondents on both sides. Trust building and changing perceptions among people divided for decades and overwhelmed by state-led propaganda in respective states is particularly important and challenging part of peacebuilding. Approximately 30% of respondents on both sides recognised the significance of trust building and breaking stereotypes. Bali–Akhtar (2017: 5) quote a civil society member from Poonch (IaJK): 'Now we know that not all people on the Pakistani side support terrorism and they also know, that Muslims on the Indian side can offer prayers freely. These are examples of stereotypes that had reinforced due to lack of information and interaction'. The restoration of all cross-LoC grassroots initiatives with greater empowerment of local chambers of commerce,[11] prioritising indigenous Kashmiri traders and their products, should be included in bilateral peace process as a key pillar of the KOCBMs.

The regional geostrategic environment may have a significant impact on the Kashmir issue and its future (lack of) resolution. India and Pakistan have forcibly drawn the border—currently named the LoC in Jammu and Kashmir (J&K) and they continue their dispute over the right to administer

the entire territory and its inhabitants. The former PSJ&K was divided, militarised and turned into a security hot spot, which is particularly visible in the heavily militarised Valley and in PaJK, where the presence of the Pakistani military/ISI establishment is prevalent. The right to self-determination and basic HR are denied to the people by both Indian and Pakistani governments. Their policies of marginalisation, followed by gross violations of HR, show many similarities. India's obduracy in refusing to admit mismanagement in the Kashmir Valley is followed by a policy of subjugation, arrogance of power and state actors' impunity. Referring to Pakistan's policy, Joshua T. White (2011: 250) argues that the major problem relates to potential incentives, the Deep State is likely to provide to Islamists: 'Will it continue to provide succour to militant groups operating in Afghanistan and Kashmir, which in turn pressure mainstream political parties and religious movements to condone militancy?', he asks.

Since its inception, Pakistan's political identity is constructed through the concept of 'ideological borders' with a clearly defined enemy (India) and the army as a 'state within a state', which shapes domestic and foreign policy to fit its preferences. One of the prerogatives of this strategy is to formulate a foreign policy on the basis of an ideologically driven national identity and the two-nation theory, which manifests itself in India-centric threat perceptions and a persistent revisionism in Kashmir. The likelihood of abandoning the revisionist agenda and prosecuting a policy of normalisation with India is highly limited in the foreseeable future.[12] However, taking into consideration Pakistan's internal and external challenges, it is beyond doubt that a policy shift on proxy strategy is necessary for regional development and security and it is within Pakistan's nation own interest. Any shift in Pakistan's official narrative would entail denying the ideological paradigm, which was constructed around the two-nation theory, reducing the political role of radical Islam in the state's foreign and internal policy, curtailing hard-line Islamists and curbing the activities of the ISI-backed proxy forces, which consider Kashmir as their *jihādist* quest. The elevation of Imran Khan to the position of the Prime Minister of Pakistan in 2018 with the army's backing seemed to confirm the assumption that any noteworthy political transformations seem unlikely.

Pakistan is therefore likely to stay reluctant to re-examine its formative ideology of 'Islam under threat', as those who are the custodians of this ideology are responsible for shaping Pakistani regional security objectives, even if they rule from the backseat;[13] the chances for Imran Khan to finish his full term as head of the civilian government largely depend on his compliance in this regard. The army's horizontal augmentation of power under Khan's government is unprecedented with various institutions given to its (often retired) representatives; it seems justified to assume that the 'Deep State' is in fact a real state, controlling both domestic and foreign policy and taking more prerogatives theoretically restricted for the elected government. For example, the overseeing of 2019-established powerful

China-Pakistan Economic Corridor Authority (CPECA, which officially comes under Ministry of Planning, Development and Special Initiatives) was given to retired Lieutenant General Asim Saleem Bajwa. The opposition parties blamed the key stakeholders for curtailing the civilian control over the strategically and economically crucial project. Although it is not directly under military rule, Pakistan also returns to the custom of providing more diplomatic positions to the army officers, not career diplomats. Retired Lt General Bilal Akbar was appointed as the ambassador to Saudi Arabia in January 2021, which is tantamount to the army/ISI's will to boost its control over the Persian Gulf region policy, especially in the situation of India-Arab Gulf states cooperation upgraded by the Narendra Modi government.

One of the vital conditions for gradual de-escalation and workable resolution is institutionalised de-extremisation of politicised, violent Islam in Pakistan and deradicalisation of Hindutva-based nationalism in India, which should not be used as tools for domestic anti-minorities hate speech and inter-state belligerent agenda. Conversely, under the Narendra Modi and Imran Khan governments we are likely to observe movement in the opposite direction. What remains unchanged is the fact that any political shift in Pakistan will need to be fully approved by the Pakistani army, which is largely uninterested in conflict resolution as the protracted dispute provides the generals with unprecedented influence and unquestioned status.[14] A relatively new Indian phenomenon might be connected with the growing political impact of the Indian Army on India's policy, especially regarding the Kashmir dispute and the administration of restive areas.

The radical Hindu majoritarianism has become increasingly mainstreamed in India, with BJP/RSS-supported Hindutva policies purposely exacerbating the process of de-secularisation. At the same time, New Delhi aims to enhance its strategic position in the shifting global order by projecting its image as the largest democracy, a tolerant, secular state with peaceful objectives and a country cherishing soft power prerogatives. If that is India's genuine portraiture, then, as Matthew J. Webb (2012: 161) argues, 'as the only Muslim majority state in India, and with substantial Hindu and other minorities, Jammu and Kashmir should be a shining demonstration of Indian secularism'. Yet, it is not the case and international perception of India as the largest democracy in the world, adhering to rule of law, inclusive and soft-power oriented, is rather a *cliché,* predominantly (albeit with increased reservation) embraced by the Western states, than reality. J. Nye (2011: 116) maintains that, 'soft power depends on credibility, and when governments are perceived as manipulative and information is seen as propaganda, credibility is destroyed'.

Both Indian and Pakistani nations remain trapped in their tragic history, with traumatic partition of the subcontinent and subsequent protracted rivalry with all its dismal consequences. The postcolonial state making led to establishing the states which largely reject democratic principles and

ideologically, institutionally and legally replicate violent, colonial-like ways of exercising power, dividing societies along the communal lines, bolstering privileges of the already powerful stakeholders. In a de facto army-ruled Pakistan and BJP-governed India, the state-imposed policies based on disenfranchising minorities or dissidents and quelling progressive movements, civil society and representatives of the marginalised communities remain intact. As long as this domestic dispossession (which goes beyond both chunks of Kashmir) persists, the inequalities will incite popular protests, adding to domestic turmoil.

As the conflict remains a major global flashpoint, the future of Kashmir and Indo-Pakistani rivalry is subject to a heated debate among politicians, scholars, analysts, Kashmiri activists and all those who are interested in the issue. At the formal international level, the discussion mostly engages the Indian and Pakistani establishments and permanent members of the UNSC. The narrative that Kashmir is an issue between India and Pakistan seems to have a support from the international community. The reaction in the aftermath of the unilateral abrogation of Article 370 and, by implication, Article 35A by the Narendra Modi government and the reorganisation of the IaJK prove that point. The international community rather desisted from openly criticising India over the constitutional changes that were introduced in August 2019. Even if certain initiatives were undertaken, the Kashmiris were mostly excluded. For example, when, at China's request, the UNSC debated over Kashmir for the first time in 50 years, Kashmiri representatives were not admitted to share their views. Notably, the Kashmir Valley was kept under blackout conditions and local activists and politicians were imprisoned or placed under house arrest. The suspicion that the BJP government's decision was aimed to change the communal dynamics in Kashmir, with an influx of the Hindus (but not Pandits and other indigenous Hindus who were forcefully displaced when the insurgency escalated[15]) to the Valley so that the support of the Muslims will no longer be crucial for the legitimacy of Indian rule, further fertilised the sense of injustice and the determination to continue the struggle.[16]

In such restive atmosphere, enhanced radicalisation and protests in the Kashmir Valley seem a highly predictable scenario with Pakistan's relentless incentives to exploit politically the internal dynamics in the volatile region. Revolutionary models in the Islamic world: in Iran, Afghanistan and the Palestinian *intifada* have strongly influenced the narrative of subjugation among Kashmiri Muslims,[17] and due to *jihādist* agenda propagated by radical groups and the oppressive Hindutva policy of BJP/RSS, the communal aspect will gain even more significance within the separatist movement. With the abrogation of Article 370 and the J&K bifurcation, Pakistani leadership, although it also pursues the policies of demographic engineering in PaJK, received another pretext for the strategic use of the ideological connotation of the two-nation theory as a point of reference in its vehement criticism of HR violations by India. If New Delhi rests primarily on militarisation and subjugation of Kashmiri Muslims without reaching out to their grievances,

it may nourish Pakistani revisionism and Kashmiri sense of dispossession, and in effect, prolong the endless impasse in Kashmir conflict resolution.

The institutionalised political, legal and socio-economic deprivation and abuses persistently perpetrated by the federal authorities in both parts of Kashmir call for adopting a well-balanced and long-term resolution-oriented strategy by the governments in New Delhi and Islamabad, with the active engagement of the representatives of the former PSJ&K residents from both sides of the LoC. Radha Kumar and Ellora Puri (2009: 261) debated in 2009 whether internal devolution may contribute towards peacebuilding in Kashmir. They argued that 'many Indians, Kashmiris and Pakistanis are convinced that overall devolution (in Centre-state relations) will lead to a stable peace only if it is accompanied by internal devolution on both sides of the LoC. (…). Most proposals for devolution are based on territorial administrative units. Yet, communal—especially minority—polarisation has become an important element of continuing conflict in the state(s). Clearly, some form of minorities' protection has to go into any devolution package'. Devolution of power down to the provincial, district and local level[18] seems to be a crucial political tool which could introduce more just power-sharing arrangements and de-escalate tensions within Kashmir, on both sides.

Frequent ceasefire violations (CFV's) of the ceasefire line (declared in 2003 by the then Pakistan's Prime Minister Zafarullah Khan Jamali and thereafter formally accepted by India) remain another unsolved problem. Both states try to exonerate themselves from responsibility by claiming they are retaliating to the adversary's unprovoked violations of the agreement. They blame each other for shelling and targeting civilians across the LoC and International Border,[19] which occur routinely on both sides and escalated in 2019,[20] following J&K's bifurcation. On the one hand, both sides claim they care for Kashmiri civilians who are the main victims of CFV's, on the other, they incessantly engage in such hostilities. For example, in October 2020, the Indian Ministry of External Affairs accused Pakistan on 3800 such acts only that year[21]; in December 2020, Pakistan claimed India carried out 3003 CFV's.[22] It was the highest escalation since 2003. Formalisation and reconceptualisation with agreed, clear definition of procedures both sides shall undertake to completely refrain from cross-border shelling should be regarded as a key principle of the KOCBMs.

According to the World Health Organization, India was ranked 117th and Pakistan 144th in average life expectancy in 2019. The CIA World Factbook, which includes 226 political entities, including the states and overseas territories, places India and Pakistan on the 170th and 177th positions, respectively.[23] There is no doubt that protracted conflict and arms race largely contribute to systemic negligence of such crucial social needs as appropriate healthcare and other underlying challenges of good health, such as access to sanitation or clean water, which constitute a basic human right.[24] Political *détente* between India and Pakistan is therefore badly needed due to multiple economic and socio-political reasons but depends on the willingness

of the Indian and Pakistani (future?) governments to find some motivation to de-communalise bilateral relations and domestic parlances, to compromise, undertake actual steps to de-politicise and gradually eradicate fundamentalism and move away from using the HR as part of the cynical blame game and political tool. Curbing radicalisms and aggressive ideologies by introducing appropriate, cooperation-focused narratives to the school *curricula* seems the right and reasonable option to provide initial framework for future de-securitisation and depolitisation of the Kashmir issue. History shows that intractable conflicts can be transformed into resolvable ones and borders can be made irrelevant. Following the centuries of bloodshed, militaristic narrative, religiously and nationalistically motivated wars, the states in Europe put in tremendous effort to eliminate the impediments to peace and to initiate European integration, which would later turn into the European Union. Even in the current era of populist and nationalist narratives, and other crises, which have accompanied the history of European integration,[25] there is no doubt that the political, economic and social outcomes of the integration are unprecedented and have provided significant progress for the EU member states and their citizens. Correspondingly, despite recent major challenges (terrorism, refugee crisis and migrations) combined with nationalist postures, used as a political tool to accumulate power by far-right populists, which were materialised by the Brexit, still 61% of the EU27 citizens acknowledge their sense of togetherness and view their country's membership in the EU as beneficial. Importantly, this support remains at a historically high level.[26] Obviously, materialisation of such advanced integration initiatives in South Asia is a distant future goal, if (hopefully) at all. Nevertheless, the conclusions taken from the successful European integration should be regarded as a framework for analysis of how to ease tensions and build relationships in the region that experienced protracted rivalries and wars. India and Pakistan could follow this example of gradual reconciliation and integration by developing cross-border collaboration, which is an important feature of any integrational initiative. That would require a newly crafted approach vis-à-vis bordering regions, which is an enormous challenge, taken the hard line stance of current military leaderships. Softening the LoC and international border, developing cross-border links and collaboration, would unquestionably help to invigorate these neglected regions economically. An emphasis on the demilitarisation and deradicalisation of political rhetoric, along with fostering equity and equality, addressing power disparities and considering human development, dialogue, reconciliation and social justice as priority, is integral to Johan Galtung's perception of a positive peace.[27]

Attaining the culture of peace with the gradual introduction of Galtung's negative (absence of violence) and positive (human understanding through communication and education) peace prerogatives referred to earlier in this book, might serve as a discursive background for drawing a roadmap for peace between India and Pakistan. The major aim of reconciliation should focus on searching for the win-win formula with an obligatory consideration

of the interests of the residents of all parts of former PSJ&K. The major starting point of reconciliation process should be based on the thorough debate of what is practically achievable in this complex, multilayered conflict. Wilfried Graf *et al.* (2007: 125) highlight the necessity to include the youth in the peace process and give examples of projects aimed at bringing Palestinian and Jewish Israeli youth together, simultaneously with meetings of the political elites. Such a youth-oriented approach should be regarded as a key pillar of the culture of peace. Unfortunately, person-to-person contacts between young Indians and Pakistanis are largely restricted by the stakeholders, mostly to the Internet (if it is not disrupted), where people exchange thoughts via fora and social media. The activities of multiple pro-establishment trolls on both sides, who aim to sow hatred and divisions, need to be noted here.

Even a cursory look at the historical developments and current conflict-prone situations in the relations between India and Pakistan conveys the impression that neither establishment is interested in the de-escalation of mutual animosity. Instead of prioritising winning the support of the civilian population with a more ethical approach, in their strategies vis-à-vis Kashmiri protesters, highly brutal tactics are implemented with disregard for international law. Gilgit-Baltistan (GB) and AJK are strictly controlled by Islamabad/Rawalpindi, and any dissent is immediately curtailed. Through bifurcation of the erstwhile state of J&K, the BJP achieved its long-term hyper-nationalist and communalist objectives but diminished the chances for a people-oriented resolution. Nyla Ali Khan (2018: xxvii) observed: 'the dominant perception of Kashmir as just an insurgent state within the Indian Union and not as a political unit with legitimate regional aspirations might benefit security hawks'. The scrapping of Article 370 by the Indian authorities strongly resonated also in AJK. The protests which erupted in PaJK showed the growing resilience of Kashmiris on that side of the border, who cherish the historically shaped connections and family bonds with the Valley. The demonstrations at *Laal Chowks* (Red Squares) in Srinagar and Muzaffarabad had symbolic meaning and signified the demands of the people for their rights and just treatment, irrespective of which side of the LoC they reside.

An approach to the conflict which is durable and acceptable for ordinary Kashmir residents and involves tackling the dismal HR conditions in Indian- and Pakistani-administered Jammu and Kashmir is a *sine qua non* condition for the conflict's successful resolution. The question 'what do Kashmiris want' has been asked numerous times. '*Ham kyā cāhte? Āzādī!*' (What do we want? Freedom!), would probably be the answer provided today by a significant portion of residents from the Valley, AJK and GB. In 2010, Robert W. Bradnock from King's College London and Chatham House published the first-ever opinion poll on both sides of the LoC, to assess current attitudes to the ongoing dispute over Kashmir and investigate its possible solution. The interviews were conducted simultaneously on

both sides of the LoC in September-October 2009, with exclusion of some parts of the erstwhile PSJ&K, for example, GB. According to the report, 80% of Kashmiris felt that the dispute was very important for them personally—75% in AJK and 82% in J&K. The report showed that although people were not aware about the details of the Indo-Pakistani talks taking place, 47%, of those aware of the dialogue felt the talks had increased their safety—30% in AJK and 55% in J&K. Most importantly, 43% of the interviewed adult population declared they would vote for independence for the whole of Kashmir, 44% in AJK and 43% in J&K. For a majority of the population (81%), unemployment was thought to be the most significant problem faced by Kashmiris (66% in AJK and 87% in J&K). Government corruption (22% AJK and 68% J&K), poor economic development (42% AJK, 45% J&K) and the Kashmir conflict itself (24% AJK, 36% J&K) were mentioned as main problems. HR abuses were regarded as much severe problem on Indian side (19% AJK, 43% J&K).[28] Conducting such survey currently, over 10 years later, in all parts of the former PSJ&K, would provide precious insights into the situation and dynamics of the public opinion, but this will probably remain an unmet challenge due to growing hostility towards foreign NGO's and the unwillingness of both governments to allow independent researchers to carry out field work in Kashmir.

Changing the *de facto* sovereignties of India and Pakistan over their respective parts of Kashmir would require altering the territorial *status quo*. Taking into consideration the staunch resistance of both governments to such a scenario, combined with the integral role of Kashmir in shaping Indian and Pakistani state nationalisms, redrawing the border is practically impossible in the current geopolitical landscape. Significantly, a perceptible modification in India's and Pakistan's policies into a more determined approach aimed at exercising full political control over divided parts of Kashmir can be observed since 2018–2019, which may lead to a greater determination on both sides to accept *status quo* and transform the LoC into a permanent border. In such circumstances, relinquishing territorial claims by both states to the parts of Kashmir administered by the neighbour cannot be excluded; some authors claim that backdoor agreement initiatives by both establishments, undertaken to formalise LoC into a *de jure* border already exist.[29] Even if this scenario materialises, it is unlikely to eliminate bilateral jingoist rhetoric, overpoweringly engaging the states' resources and negatively affecting the interests of the societies. The 'new India' and 'new Pakistan' paradigms, with bolstered far-right majoritarian, ideological features, exacerbated by Narendra Modi and Imran Khan governments with their xenophobic discourses escalating in parallel, are likely to characterise this divisive, emotional, escalation-prone confrontation, unless a more pragmatic, conciliatory leadership comes to power.

The reconciliation and cooperation between former long-term, seemingly unfeasible adversaries is achievable with cooperative decision-makers, as the France-Germany example shows. What seems to be unapproachable in

the particular time might become achievable in the future. To reach the goal of peaceful relations, reframing exclusivist, ideological paradigms by India and Pakistan seems indispensable, as they bring harm to the entire societies. Pakistan's balkanisation, preceded by brutal army intervention and war in East Bengal in 1971, referred to as 'genocide' by its witness, Karachi-born reporter, Anthony Mascarenhas,[30] was an ultimate proof for ideological insolvency of the two-nation theory. Religion itself does not provide an adequate framework to represent the entire, diverse, nation, and its aggressive politisation does not curb secessionisms when basic economic, political, cultural and linguistic rights are curtailed and structural violence is perpetrated. The two-nation theory and India's one nation theory (bolstered by Hindutva) are based on divisive assumptions and serve as tools to materialise concrete political ambitions of narrow establishments; they should be repealed and replaced with narratives which are more suitable in the third decade of the 21st century and will enable to face the upcoming challenges collectively. Anchored in stalwart assumption that only cooperation and regional integration can enable India and Pakistan to develop and face security challenges, the new conceptualisations of 'new India' and 'new Pakistan' a necessity. They should involve rejecting those theories which are echoing the colonial past, and implementing the new approaches, appropriately addressing the needs of modern nations.

The reframed reconciliation process with multilateral (India-Pakistan—both chunks of Kashmir) KOCBMs should follow certain general criteria: (a) the transparent and clearly defined mechanisms and procedures on bilateral and multilateral level, (b) a shift from establishment-oriented to a more citizen-oriented approach, which should diminish the risk of powerful stakeholders further exploiting their position not only at the cost of the residents of Kashmir but also Indian and Pakistani societies as a whole, (c) an ability to compromise and discuss contentious issues, which requires competent leadership and (d) legally and institutionally assured good governance-based policies. The Kashmir conflict complexity and the fact that became a matter of growing international concern (with more reports on Kashmir recently produced by governmental and non-governmental organisations, research centres, think tanks, etc.) induces the necessity to provide a comprehensive discursive platform for debating the future of Kashmir and India-Pakistan relations.

Kashmir conflict and its durable resolution is not only about the question of territory and territorial irredentism but also about identity, religiously motivated ideological hyper-nationalism, power procurement, historical inheritance and, above all, the political rights and freedoms of the people. The dispute is also particularly complex because it engages many national and international actors with diverse interests and different abilities to materialise their goals. To reach a settlement, this unique complexity has to be taken into consideration. Additionally, a staunch approach, manifested particularly by India, that any foreign engagement violates

the non-negotiable non-interference paradigm needs to be profoundly re-considered and re-conceptualised. Resolving Kashmir conflict is a challenge not only for India, Pakistan and Kashmir, but also for the entire international community. Neither in IaJK, PaJK nor in any part of the world defying fundamental democratic norms, perpetrating grave violations of basic HR and freedoms should be regarded solely as 'an internal issue'.

Many proposals, plans, formulas aimed at resolving the conflict within multitrack framework engaging different actors, have been crafted by political leaders, governmental and non-governmental organisations, academics and activists, but none of them was successfully introduced and upheld. The Vajpayee's plan of humanity, Kashmiri identity, and democracy (*vide supra*, §15) seems the exception, as India often refers to it in its policy vis-à-vis Kashmir. Notably, however, this formula as interpreted by the Narendra Modi's government, is a tool of *faits accomplis* policy in IaJK, mostly serving the interests and strategic objectives of New Delhi and its docile local representatives, which is especially perceptible following J&K bifurcation. Taking into consideration the current political relations between India and Pakistan as well as the policies of India and Pakistan towards Kashmir, the prospects of solving the conflict with protection of HR will unceasingly remain a vital challenge in the foreseeable future. The inhabitants of both sides of LoC should have an unobstructed opportunity to freely quest for their rights and liberties as well as to frame and articulate their experiences of multilayered marginalisation and dispossession without the fear of retribution either from the state apparatus of India and Pakistan, or from ultraconservative religious groups. The international community has responsibility to actively support democratic transitions in IaJK and PaJK and to assist in the search for solutions, de-escalation, justice and peace. It is of utmost importance to provide the accountability of those who perpetrate the abuses, combined with a thorough and impartial investigation of the human right violations committed by the military and civilian establishments of India and Pakistan as well as violent, *jihādist* organisations and their supporters vis-à-vis the inhabitants of the former PSJ&K. Autonomy, freedom, independence on the one side, oppression, marginalisation and postcolonial hegemony on the other—these are the major catchwords which have dominated the discursive space regarding the future of Kashmir. The debate on how to resolve Kashmir imbroglio should include those who pay the utmost price for the ongoing conflict; the region's uniqueness should be preserved as a heterogenous conglomeration of cultures, customs and languages, religions. That would require genuine cooperation of central governments and the representative leadership of all chunks of IaJK and PaJK. The regions which constitute the former PSJ&K, instead of being a centrepiece of power rivalry on international and domestic levels, could be transformed into a symbol of regional incongruity and a prominent exemplification of historically inherited inclusiveness of the subcontinent. Protection of cultural identity of all parts of former PSJ&K, with respect

to regional and sub-regional vulnerabilities, lies in the interests of Indian and Pakistani nations not only because it paves the way to peacebuilding initiatives but also because it may promote the international image of these states as adherents of the democratic values, accountability and respect for basic civil and political rights, not as proponents of hegemonic ownership based on multi-layered disenfranchisement and *divide et impera* approach.

With many paradoxes on display,[31] the Kashmir imbroglio is a very complex problem, with various agendas and determined stakeholders who are profiting from the ongoing conflict and the normalisation in the subcontinent is likely to pose a challenge for the forthcoming generations of Indians, Pakistanis and Kashmiris. The durable solution between India and Pakistan is not to be crafted for the interests of the ruling elites but must include power-sharing approach, benefit Indian and Pakistani citizens and be acceptable to the residents of former PSJ&K. The efforts should be made to include moderate secular and religiously motivated groups to the consensus building process[32] and defy those which openly resort to violence or religious fanaticism. Unfortunately, for the current, bellicose leadership in India and Pakistan a significant step forward is barely possible: Pakistani army seems reluctant to resolve Kashmir conflict as it would be perilous for its strategy, unchangeably strongly vested in conflict with India,[33] India governed by Hindu nationalist cabinet has also applied an openly confrontative rhetoric. Nonetheless, an active civil society and staunch resilience against injustices, with pro-democratic movements gradually reclaiming their space in both countries, give hope for future transformations towards a more inclusive political order and cooperative regional security environment. By that time, Kashmir conflict will remain not only a matter of international law but also a fundamental 'challenge to our shared humanity'.[34]

Notes

1. Balcerowicz–Kuszewska (2022b).
2. Tuchman (1984: 2–4; 393–395). See also Haqqani's (2018: 283–286) application of 'folly' criteria to Pakistani counterproductive strategy dating back to the state's inception. Today Tuchman's governmental folly and obstinacy analysis could be adopted to reflect on both Pakistani and Indian ideologically driven policies, which destructively polarise societies instead of building consensus and promoting cooperation.
3. *Vide supra*, §16, footnote 41. More on India's re-connectivity endeavours and challenges with Central Asia, see Kuszewska (2020). Pakistan is engaged in the China-Pakistan Economic Corridor (CPEC), which may enhance its multi-dimensional dependence on China. The CPEC is a part of the Belt and Road (BRI), Chinese grand initiative, regarded by India as encroachment into its sphere of interests and a major security threat posed by Beijing's revisionism. More: Balcerowicz–Kuszewska (2022a, §10.6), Kuszewska–Nitza-Makowska (2021).
4. Balcerowicz–Kuszewska (2022b, §3.4).
5. Blum (2020).
6. More Balcerowicz–Kuszewska (2022b).
7. More Balcerowicz–Kuszewska (2022b).

8. More on the connections between *Feindbild* and violence against 'the other': Bukow (1996: 64–69).
9. Cohen (2013: 56), Chatterji (1983: 194).
10. At the turn of the century the then US President Bill Clinton declared that South Asia was the world's most dangerous place. See: Marcus (2000).
11. In February 2021, the Jammu Chamber of Commerce and Industries complained about economic standstill and tremendous losses due to restrictions imposed after the bifurcation of J&K in 2019 and, later, due to the COVID-19 pandemic.
12. Fair (2014: 19).
13. Haqqani (2004: 85).
14. Snedden (2015: 290).
15. It must be highlighted that in addition to the displaced Kashmiri Hindus, a sizeable Muslim population left the Valley to escape the consequences of the unrest. Pandits' potential return may face many hurdles as Koul (2020: 184–185) argues, due to traumatic memories and three-decade process of their Indianisation and Hindutva effects, which distanced them from the Valley. Those living in India often no longer remember/regard Kashmir as their home. Moreover, some Kashmiri Muslims would not accept Pandits' permanent return. Nonetheless, those Pandits who wish to return should be provided with this right—restoring spiritual and cultural uniqueness of Kashmir could be regarded as part of (lengthy and challenging) reconciliation process.
16. Some authors highlight that the insurgency in the Kashmir Valley is mostly indigenous as the quest for independence or enhanced autonomy, with no leanings towards Pakistan. Pervez Hoodbhoy (2013: 118) highlights that Kashmiris prefer independence or greater autonomy. Happymon Jacob (2013:182) argues that 'Kashmir's *āzādi* movement has political, philosophical and nationalist underpinnings of its own, irrespective of Pakistan's intentions and designs'. Some interviewed (in the years 2016–2017) Kashmiri nationalists residing in the Western countries strongly believe that the freedom of Kashmir (from India and Pakistan) can be materialised, even if it seems a utopian struggle.
17. Cohen (2013: 136).
18. See: Webb (2012: 161).
19. In Pakistan's terminology the border dividing its Punjab and IaJK (presently UTJ&K) is a Working Boundary.
20. Jacob (2020: 5–6).
21. Bhattacherjee (2020).
22. Ali (2020).
23. CIA WFB (2021).
24. For instance, the International Covenant on Economic, Social and Cultural Rights recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' as stipulated in its Article 12.
25. Grimmel (2018: 1).
26. EP (2019).
27. On Galtung's approach, *vide supra*, §14.1.
28. Bradnock (2010: 4–5, 15).
29. Shahid (2020).
30. See Balcerowicz–Kuszewska (2022a, §9.4).
31. Akbar (2002: 154).
32. Kumar–Puri (2009: 248).
33. Fair (2005: 12).
34. Ghosh (2019).

18 Epilogue

Piotr Balcerowicz and Agnieszka Kuszewska

Despite any claim to the contrary, the legal status of all the territories of the erstwhile Princely State of Jammu and Kashmir, formally ceded to India by Maharaja Hari Singh with the Instrument of Accession of the State of Jammu and Kashmir on 26 October 1947 under certain conditions and treated as a provisional and temporary solution, has not been fully determined to date. An integral part of the Instrument of Accession was the official countersignature letter of acceptance issued by Louis Mountbatten, the Governor General of India, on the very next day. This exchange of letters between both parties clearly stated that 'the question of the State's accession should be settled by a reference to the people'. The idea of the plebiscite had also been discussed prior to that event, and India—with its top politicians, including Prime Minister Jawaharlal Nehru—first seemed to unconditionally accept such a solution, at least declaratively and officially and presented a flexible approach. This changed in the early 1950s, with the sudden shift symbolically represented by the arrest of Sheikh Abdullah in 1953.

Thereafter, India's position concerning the status of the territories gradually evolved over the decades till it reached an adamant and uncompromising stage based on two pillars, albeit with rather unfounded justification. First, the accession of the Princely State of Jammu and Kashmir to India was final, irreversible, irrevocable, unconditional, and non-negotiable, and therefore its all territories are to be considered an integral part of India. Any territory into which Indian administration does not extend, and which is therefore unlawfully administered by Pakistan (Azad Jammu and Kashmir and Gilgit-Baltistan) and China (Shaksgam Valley and Aksai Chin), is *ipso facto* an Indian territory occupied for foreign powers. Second, the question of the future of Kashmiri territories is a bilateral matter to be discussed strictly between India and Pakistan or between India and China. The uncompromising bilaterialism when it comes to Kashmir also stipulates that the matter of the debate is exclusively the Kashmiri territories occupied by India's neighbours, and by no means, the State of Jammu and Kashmir (till August 2019) or the two union territories, that of Jammu and Kashmir and of Ladakh (after August 2019), which naturally constitute an integral part of Indian territory. Any attempt undertaken by the international

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community, including the United Nations (UN), to seek a solution to the Kashmir conflict is regarded as meddling in the internal affairs of India. Such a stance appears as a gesture of the contempt of international legal order and earlier UN resolutions. As Part 2 of the monograph has extensively demonstrated, India's arguments are extremely vague and ultimately untenable and, consequently, the Kashmir dispute should still be considered a matter of international concern, with a pronounced role to be played by the international community in order to resolve it, and by no means, an internal affair of India or a dispute between Pakistan and India to be solved on the basis of bilateralism alone.

The matter is seen through rather different lenses by the Pakistani side, which maintains that the status of all the territories remains undetermined, that India unlawfully occupies a large part of the former Princely State and that the people of Kashmir should determine the future status in a free plebiscite. Such a position however has strings attached in a form of a hidden premise—as all Pakistani policies vis-à-vis Kashmir demonstrate—that the only outcome of such a referendum acceptable to the Pakistan side would be Kashmir's unconditional accession to Pakistan. No dissenting voices to such a policy, advocates of an independent or fully autonomous Kashmir included, are ever tolerated.

It should be reminded that, as a precondition for any future solution of the dispute, both India and Pakistan willingly accepted UN mediation as a principle of resolving the conflict at its very outset in 1948 and 1949, and at the same time, unconditionally acceded to the terms and conditions required for the determination of the future status of Kashmir as specified in the resolutions of the United Nations Commission for India and Pakistan (UNCIP) and the United Nations Security Council (UNSC). With their sheer request for mediation, both sides indirectly admitted that the status of *all* the territories of PSJ&K remained unresolved and legally undetermined. The transformation of their stance occurred when the adversaries realised that the final solution of the conflict may steer away in an undesired direction. Once it became obvious that the impartial community of international mediators and arbiters might adjudicate the dispute in a manner not fully supportive of the demands of one or the other side, both parties decided to withdraw from the process. This very plainly demonstrates the inherent unwillingness of both parties from the very beginning to work out even a semblance of compromise, and the original recourse to the mediation of the UN was a political stratagem to garner international support for one's own unyielding position alone. The 1972 Simla Agreement sealed the principle that all differences between India and Pakistan should be settled through negotiations and peaceful means. Both states endorsed the formula that 'pending the *final* settlement of any of the problems between the two countries', Kashmir dispute included, 'neither side shall *unilaterally alter the situation* and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious

relation'. Nothing has changed in legal terms ever since, and both parties should be reminded an important principle: *pacta sunt servanda*.

Seen from the perspective of the international law, the obligations of India and Pakistan and the historical development of the legal-constitutional ramifications of both states, both adversaries should be expected to restrain themselves to primarily fulfilling the role of the respective administrators of the territories of the erstwhile Princely State of Jammu and Kashmir which came under their jurisdiction. And as such legitimate administrators, with their powers granted also under UN resolutions, both India and Pakistan, are legally bound to regulate the affairs of Kashmir territories in such a manner that the territories under Pakistan's control 'will be administered by the local authorities' and that India is obliged 'to assist local authorities' (UNCIP 1948). Any deviation from legal commitments so defined—by (1) disallowing any genuine autonomy and self-rule, (2) making the laws for Pakistani- and India-administered chunks of Kashmir above the heads, and against the explicit will of the local populations, (3) introducing a direct or semi-direct rule from the capitals, Islamabad or Delhi, via the representatives imposed by the centres, (4) intimidating and bullying the population with the excessive presence of the armed forces who are allowed to operate with full immunity and impunity, (5) depriving the local populations of their inalienable right to exercising democracy and their access to justice, and (6) exploiting natural resources of the territories with no or hardly any consultation with the people—inevitably turns both the administrative powers into occupying regimes. But even in such a case, both occupying powers are obligated by the international law, e.g. the Fourth Geneva Convention, to administer the territories under applicable international humanitarian laws, through which the people's right to self-determination is fully acknowledged and any 'definitive large-scale changes in the institutional structure of the occupied territory' are precluded.

Despite the pledge of India and Pakistan to respect the autonomy of the territories they rule—in conformance with the spirit of the Instrument of Accession, with domestic constitutional constraints within Indian and Pakistani legal frameworks and with international legal obligations—and in defiance of the principles of bilateral negotiations and renouncing all policies that would introduce irreversible changes in the region, both antagonist regimes gradually dissolve the autonomous status of the Kashmiri territories. In August 2019, India unconstitutionally abrogated any remnant of autonomy of the State Jammu and Kashmir and symbolically brought the resulting two new territorial chunks, union territory of Jammu and Kashmir and union territory of Ladakh, under direct rule from New Delhi. In Autumn 2020, the authorities of Pakistan declared their will to incorporate one chunk of Pakistani-administered Jammu and Kashmir, namely Gilgit-Baltistan, into the Pakistani territory as a new province, and soon after a special committee was established to make relevant recommendations for amendments in the Constitution. These are the steps in the

prolonged process of the dismemberment of the former Princely State of Jammu and Kashmir in which both adversary parties follow the same trajectory to finally dissolve any remnant of the former Jammu and Kashmir and turn the temporary Line of Control into a permanent international border.

Over the decades of the conflict, both hostile parties have amply demonstrated that to maintain the legal indeterminateness and vagueness of Kashmir, with the vivid spectrum of an external (military, terrorist etc.) threat deliberately projected in the background, serves as an effective instrument to pursue their domestic and external policies. For their internal needs, the inconclusiveness helps justify the political sway, military power, economic domination and swift military/political careers of politicians, the top brass, the intelligence, etc. Internationally, especially in relations with the neighbours, Kashmir and the Kashmiris are used as pawns in the political game.

For the time being, as it has been the case for the last three-quarters of a century, the residents of Kashmir continue to pay a heavy price for this protracted conflict in form of massive and manifold violations of human rights and of deprivation of their civil liberties and political rights, which they should and could enjoy. The dynamics of the Kashmir conflict is also incessantly embedded in the geostrategic landscape and regional security environment of South Asia. More than seven decades of the dispute with few escalations to the stage of an armed conflict and multiple rounds of negotiations have not brought the chances for a resolution any closer, and most probably will not in any foreseeable future. Persistent majoritarian, religiously motivated nationalisms intentionally induced by Indian and Pakistani leadership as political tools to incite communal divisions domestically and bilaterally, further exacerbate mutual distrust and animosities. The state-led narratives intentionally mobilise radical portions of society on both sides of the border to stir up the already existing prejudices. Hostile Indo-Pakistani narrative is occasionally interspersed with a more appeasing rhetoric, expressing readiness to restart the talks, sending greetings on national holidays, etc., but these gestures rather evoke scepticism as they are not followed by any concrete steps.

Following the February 2019 Pulwama attack in Indian-administered Kashmir and the abrogation of Article 370 by India, the peace process, trade relations, and cross-border contacts were practically halted, which was additionally aggravated by the coronavirus pandemic. India and Pakistan, with underfinanced healthcare systems and resources, overwhelmingly spent on arms procurement, severely suffered during the pandemic. Perhaps this shared tragedy will inspire both rivals to reconceptualise their domestic priorities and bilateral strategic objectives, to genuinely restore multitrack reconciliation initiatives once the pandemic is over.

At the Islamabad Security Dialogue in March 2021, General Bajwa, the *de facto* ruling leader of Pakistan, reasonably emphasised the necessity to

move forward, arguing that it is 'naive to apply the failed solutions of yesteryears to the challenges of today and tomorrow'. He added, 'Stable Indo-Pak relation is a key to unlock the untapped potential of South and Central Asia by ensuring connectivity between East and West Asia'.[1] Such ambitious statements, especially expressed by a Pakistani general, raise doubts about whether they truly herald a shift in the strategic orientation towards development-oriented geo-economic imperatives, or they are just aimed to project Pakistan's positive, conciliatory image to the world. At the same time, Pakistan government showed yet again its acquiescent stance vis-à-vis far-right religious groups, such as Tehreek-e-Labbaik Pakistan, which, with tacit support of the non-elected 'Deep State', use blasphemy law as a tool to pressurise mainstream politics, instigate political turmoil, and sustain revisionism vis-à-vis the Kashmir Valley.

Tense domestic environment in Pakistan and BJP-ruled India makes any conciliatory gesture towards the neighbouring state particularly challenging as they are likely to meet staunch opposition from the proponents of belligerent approach. Nonetheless, moving beyond the postcolonial geopolitics with its majoritarian ideologies, and adopting an inclusive approach, is a *sine qua non* condition for peace process and settlement of the Kashmir conflict with recognising its inhabitants as genuinely equal partners in the meaningful dialogue. As the study included in Part 3 of this monograph demonstrates, the settlement of the Kashmir dispute and bilateral reconciliation would bring long-term benefits for India and Pakistan, upgrade their economic performance, and pave the way to mutually beneficial regional integration and multiple collaboration projects in South Asia and beyond. India and Pakistan, renouncing communalism and majoritarianism as state ideologies and emerging as mature, compromise-able actors, could bolster their international position and symbolically and genuinely put an end to their colonially inherited vulnerabilities.

Note

1. *Dawn* (2021-03-18).

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